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In the Supreme Court of the United States

OCTOBER TERM, 1989

VIRGINIA BANKSHARES, INC., ET AL., PETITIONERS,

v.

DORIS I. SANDBERG, ET AL., RESPONDENTS.

FIRST AMERICAN BANKSHARES, INC., ET AL., PETITIONERS,

v.

PAUL H. WEINSTEIN, ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 14(a) of the Securities Exchange Act of 1934 requires proxy statements not only to disclose material facts, but also to disclose alleged ulterior motivations of corporate directors and to characterize disclosed facts in a pejorative manner.

2. Whether a plaintiff may invoke an implied cause of action for damages under Section 14(a) of the Securities Exchange Act of 1934 when the allegedly misleading proxy statement could not possibly have affected the outcome of the proxy vote, and the plaintiff has not demonstrated causation in any other way. This is a question that the Court explicitly left open in *Mills* v. *Electric Auto-Life Co.*, 396 U.S. 375, 385 n.7 (1970).

3. Whether a reviewing court may uphold a general jury verdict when some of the grounds of liability submitted to the jury were invalid and there is no way of knowing whether the jury based its verdict on an allegation that is sustainable on review.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties named in the caption, the following persons were defendants in the district court and appellants in the court of appeals and are petitioners in this Court:

Emanuel A. Baker, Jr.
Harriet F. Bradley
Thomas B. Chamberlin
Sidney O. Dewberry
Eric W. Erdossy
Charles T. Lindsay, Jr.
Linda H. Michael
E. Guy Ridgely
Charles H. Smith, Jr.
Henry A. Thomas
Jack W. Beddow
Joel T. Broyhill
Thomas P. Chisman
Milton L. Drewer, Jr.
George W. Johnson
Donald R. Maxfield
Milton V. Peterson
Glenn W. Saunders
Verlin W. Smith
Stephen G. Yeonas

In addition to the parties named in the caption, the following persons and corporations were plaintiffs in the district court and appellees in the court of appeals and are respondents in this Court:

Roslyn L. Weinstein
Richard Weinstein
Leonard Weinstein
Gary Plushnick
William B. Dockser
Philip Gross
John P. Kyle
Robert I. Schattner
Dante E. Guazzo
Helene D. Engel
Barbara L. Eller
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Edward S. Loveless
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Joseph B. Latshaw, Jr.
Claude E. Keener, Sr.
Luther A. Gilliam
William L. Mason
Jane M. Dinunzio
Stephen Hartwell
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Patricia Hooker Bonnes
Kathryn Hooker Spradlin
Eugene Hooker Walter
Rebecca Weybright
Anne Carol Weybright
Robert and Bernice Walter
Stephen W. Hartwell, II
Edwin Lynch
Clarice Brault
Jay Weinstein
Helen Weinstein

Evelyn Bushwick
Carol Plushnick
Laura Lee Cookson
Nancy Gross
Kay Kyle
Helen Mackey Gray
General Harry J. Engel
Joseph M. Eller
Henry P. Deyerle
Cynthia B. Dolvin
Norman T. Henry
Katherine Ann Johnson
Thelma H. Loehler
Michael A. Puzak
Benjamin Weiner
Harold E. Shomo
P. S. Webb Co.
Claude E. Keener, Jr.
Foundation for Middle East Peace
Rudolph A. Dinunzio
Anna C. Hooker
Dorothy V. Tobin
Suzanne Hooker Evans
Joseph Edmund Hooker
Mary Helen Walter
Steven Daniel Weybright
David Hooker Weybright
Nokesville Church of the Brethren
Elizabeth H. Nixon
Anthony Colasanto
Helen M. Lynch

Petitioner First American Bankshares, Inc. is the parent company of petitioner Virginia Bankshares, Inc. Neither company has subsidiaries other than wholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully request the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 891 F.2d 1112. The district court issued no written opinion in this case.

JURISDICTION

The court of appeals entered its judgment on December 15, 1989 (App., *infra*, 4a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The Merger. This litigation grows out of a merger in May 1987 involving First American Bank of Virginia ("Bank") and petitioner Virginia Bankshares, Inc. ("VBI"), which is a wholly-owned subsidiary of petitioner First American Bankshares, Inc. ("FABI"). Prior to the merger, VBI owned 85% of the Bank's stock. Approximately 2,000 minority shareholders owned the remaining 15%. C.A. App. 67. The Bank had a majority of independent directors, who themselves owned 8% of the minority shares. App., *infra*, 46a. Because of long-term planning needs and the increased costs and reporting requirements associated with public ownership of a minority stock interest, the Chairman of FABI's board of directors, Clark M. Clifford, concluded that it would be prudent for FABI to propose a merger whereby the minority shareholders of the Bank would receive fair value for each of their shares as provided for by Virginia law. C.A. App. 1032-1033; see Va. Code Ann. § 13.1-716 *et seq.*

To assist it in reaching a decision regarding a fair price to offer for the minority shares, FABI engaged the services of an outside investment banking firm, Keefe, Bruyette & Woods, Inc. ("KBW"), to give its opinion on a price that would be fair from a financial point of view. KBW considered a variety of relevant factors, including the current and historical market prices of the shares and the fact that at no time had the Bank's shares sold for more than $33 per share. C.A. App. 1324. Given the substantial trading in the Bank's shares during the three years prior to the merger (764 trades involving 343,108 shares), the trading price was considered to be a significant indicator of value. C.A. App. 955.[1] KBW issued

[1] Another factor considered to be highly relevant was an undersubscribed rights offering by the Bank in March 1986. The Bank had offered 25,771 shares to the minority shareholders at $30 per share, with each shareholder entitled to purchase one share for every 28 shares already owned. Even at this below-market price, however, fewer than half the eligible minority shareholders exercised their rights, and only 15,024 of the shares were purchased by minority shareholders. C.A. App. 1323.

an opinion letter which, after describing the terms of its employment by FABI and the facts it took into account in assessing the shares' value, declared that "we are of the opinion that $42 per share represents a fair price for the shares of the First American Bank of Virginia not currently owned by [FABI]." App., *infra*, 75a-76a.

After FABI presented its merger proposal to the Bank, the Bank's board of directors appointed a special executive committee of directors to evaluate the proposal. That committee met to consider FABI's offer and later heard a presentation from the KBW appraiser who had evaluated the shares. Although the committee considered retaining another investment banking firm to render a second fairness opinion, it concluded that this was unnecessary given the large premium above market price (approximately 30%) represented by the offer of $42 per share and KBW's confirmation of the fairness of the offer. C.A. App. 758. In February 1987, the Bank's board, acting on the recommendation of the executive committee, voted unanimously to approve the proposed merger. App., *infra*, 53a.

The Proxy Solicitation. In accordance with Virginia law, a proxy statement describing the proposed merger was prepared and sent to each stockholder in preparation for the annual stockholders' meeting. Since FABI owned 85% of the Bank's shares, it had far more than the two-thirds needed to effectuate the merger without consent from any of the minority shareholders. See Va. Code Ann. § 13.1-718E. Nonetheless, the proxy statement contained 35 pages of information regarding the merger, including a copy of the proposed merger agreement and the KBW opinion letter. App., *infra*, 34a-76a.

The proxy statement reported that the merger "has been approved by the Board of Directors because it pro-

vides an opportunity for the Bank's public shareholders to achieve a high value for their shares. The price to be paid is about 30% higher than the $32.50 per share at which the Bank's common stock traded on February 8, 1987, the last trading day prior to the announcement of the proposal." App., *infra*, 53a-54a. The proxy statement also described the controlling shareholder's interest in the merger, explaining that the "proposed Merger will enable the Resulting Bank to compete more effectively, provide the opportunity to realize certain economies, and result in an institution better able to respond to technological change." *Id.* at 38a.

To inform minority shareholders of facts that might be deemed relevant in assessing the board's recommendation, the proxy statement disclosed exactly how many shares each director owned. It also explained that the "Bank has had, and expects to have in the future, banking transactions in the ordinary course of its business with directors, officers, principal shareholders, and their associates." App., *infra*, 51a. The proxy statement added that the "Board of Directors of the Bank as comprised prior to the Effective Date of the Merger will continue to serve as the Board of Directors of the Resulting Bank." *Id.* at 59a.

The proxy statement further stated that "FABI's Board of Directors commissioned Keefe, Bruyette & Woods, Inc. ('KBW'), an independent investment banking firm, to pass on the fairness of the Merger from a financial point of view." *Id.* at 38a. After setting forth KBW's qualifications to evaluate the shares, the proxy statement described in detail the terms of KBW's engagement:

> For rendering its opinion to FABI, Keefe, Bruyette & Woods, Inc. will be paid $25,000, and if the Merger is consummated will be paid an additional fee of $75,000. In addition, FABI will reimburse Keefe, Bruyette & Woods, Inc., for all of its reasonable out-of-pocket disbursements and expenses and has extended to Keefe, Bruyette & Woods, Inc. indemnification arrangements usual in such engagements.

Id. at 55a. The terms of KBW's compensation also were set forth in KBW's opinion letter, which was attached to the proxy statement.

At the April 21, 1987 meeting of the shareholders, the proposed merger received overwhelming approval by 97% of the shares voted. In addition to FABI's votes, over 70% of the minority shares were voted in favor of the proposal. C.A. App. 342.

The State Court Litigation. Not all shareholders were satisfied with the price they would receive under the merger plan. Six days before the scheduled meeting of the shareholders, Paul H. Weinstein and 12 other shareholders filed an action in the Circuit Court of Fairfax County, Virginia seeking to enjoin the meeting and the merger. The plaintiffs alleged, *inter alia*, that the "$42 per share that defendants propose to pay complainants and other minority shareholders is far less than the true value of the shares." C.A. App. 36. The complaint, which was based on information set forth in the proxy statement, alleged that the directors acted improperly in relying on the KBW assessment because they "failed to conduct any independent investigation of the fairness of the proposed Merger and, specifically, failed to retain any independent financial advisor to advise the Directors as to the fairness of the plan and of the price being imposed on the minority stockholders." *Id.* at 37.

The Virginia court denied relief, explaining that Virginia's statutory appraisal remedy for dissenting shareholders does not cover banks and that "[c]omplainants may not obtain that which the legislature has taken away by masking their request as the enforcement of an equitable duty." App., *infra*, 32a-33a. The court acknowledged that minority shareholders would have an action at law if the directors breached their fiduciary duties or engaged in fraud, but it ruled that the "complainants have not alleged facts sufficient to support either of these

claims." *Ibid.* In light of the Virginia trial court's decision, which the Virginia Supreme Court later declined to review, the annual meeting of shareholders proceeded as planned, and the merger was approved.

The Federal Court Litigation. On March 14, 1988, another shareholder, Doris I. Sandberg, appearing through the same counsel, filed a class action in the United States District Court for the Eastern District of Virginia. Much like the previous state law complaint, the federal complaint alleged breach of fiduciary duty based on the supposed inadequacy of the $42 per share received by minority shareholders. But this complaint also alleged that FABI, VBI, and the individual directors of the Bank had violated Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), by issuing a proxy statement that "contained misstatements of material fact and failed to disclose material facts necessary to make the statements made not misleading." C.A. App. 73.[2]

The district court refused to certify a class of minority shareholders. It also declined to allow a group of plaintiffs, led again by Paul H. Weinstein, to intervene in the *Sandberg* litigation. The federal claim therefore proceeded to trial as an individual action involving a shareholder who owned 2,442 shares and who claimed that the proxy statement contained six misstatements or omissions concerning the merger transaction. App., *infra*, 15a-17a. The jury returned a general verdict for the plaintiff on the federal count in the amount of $43,956, or $18 per share. On the state law claim of breach of fiduciary duty, the jury found in favor of the two corporate defendants but against the 20 individual Bank directors, assessing damages in the same amount.

[2] Section 14(a) makes it unlawful to solicit a proxy in contravention of rules and regulations prescribed by the SEC or a federal bank regulatory agency. The prohibition of material misstatements or omissions contained in the FDIC regulation governing this case, 12 C.F.R. § 335.206, is substantially identical to the SEC's regulation contained in 17 C.F.R. § 240.14a-9.

While the *Sandberg* litigation was pending, a group of 67 plaintiffs who owned 182,902 shares, led once again by Paul H. Weinstein, filed a separate action in federal court. After the *Sandberg* verdict was rendered, these plaintiffs moved for summary judgment, asking the court to apply the doctrine of non-mutual offensive collateral estoppel. Over petitioners' objection, the district court applied this doctrine and granted summary judgment for these plaintiffs, awarding them the $18 a share that the jury previously had awarded Mrs. Sandberg, for a total of $3.3 million. App., *infra*, 28a-29a.[3]

The Decision Of The Court Of Appeals. On petitioners' appeal, the Fourth Circuit affirmed the *Sandberg* judgment and the grant of summary judgment in *Weinstein*. The panel held that two of the six alleged misstatements that had been presented to the jury could support liability under Section 14(a).

The court of appeals first ruled that the proxy statement falsely described the motives and beliefs of the Bank's directors, who had recommended the merger in the proxy statement for the reason that the price reflected a substantial premium over market price for minority shareholders. According to the court, "the jury was certainly justified in believing that the directors did not believe a merger at $42 per share was in the minority stockholders' interest but, rather, that they voted as they did for other reasons, *e.g.*, retaining their seats on the board." App., *infra*, 15a.

The court of appeals next ruled that it was deceptive for the proxy statement to describe KBW as "an independent investment banking firm." The court concluded that the implication in the proxy statement that KBW made "an independent determination could certainly have been found to be a material misrepresentation." App., *infra*, 16a.

[3] The court similarly granted summary judgment on the state law claims, but because of Virginia's statutory limit on directors' liability, this alternative award was limited to $2.3 million.

Because of the general verdict that the jury returned, there could be no assurance that the jury had, in fact, predicated liability on either of these allegations. App., *infra*, 16a n.3. Nonetheless, the court of appeals refused to consider whether the four other allegations presented to the jury set forth valid claims under Section 14(a), holding that "the submission of both correct and incorrect factual bases supporting a single theory of recovery is not grounds for reversal of a judgment on a general verdict." *Id.* at 17a.

The court of appeals also deemed it irrelevant that plaintiff Sandberg "admitted lack of reliance" on the allegedly misleading proxy statement and that the minority shareholders had no means of blocking the merger. App., *infra*, 11a. Under Virginia law, FABI's ownership of 85% of the Bank's shares gave it the right to effect the merger even if every one of the minority shareholders voted against it.[4] Although the court of appeals recognized that this Court had previously left open the question whether causation could be established under these circumstances, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 385 n.7 (1970), the court proceeded to announce a rule that entirely dispensed with any need to show causation. App., *infra*, 12a-13a (citing *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974)). The court declared that "if the proxy statement contained material misrepresentations and was an essential link in the merger, § 14(a) liability may be established" even though the individual plaintiff could not prove "reliance" on the proxy statement and even though "the minority's voting strength is insufficient to halt [the] merger." App., *infra*, 14a. The damages

[4] The proxy statement expressly informed the shareholders of this fact, noting that "the Plan of Merger must be approved by the vote of more than two-thirds of the outstanding Bank common stock entitled to vote. Because Virginia Bankshares owns more than the requisite minimum, and has indicated its intention of voting for the Plan of Merger, the Bank's Board of Directors expects the Plan of Merger to be approved." App., *infra*, 52a.

caused by the allegedly erroneous statements in the proxy solicitation, the court ultimately concluded, were the difference between the price the minority shareholders actually received ($42 per share) and the price asserted by plaintiff's expert witness to represent the stock's "inherent value" ($60 per share). *Id.* at 20a.

On plaintiff Sandberg's cross-appeal, the court of appeals reversed the trial court's refusal to certify a class of all minority shareholders. The result of this ruling is that the $43,956 judgment that the jury awarded to Sandberg might now be transformed on remand into a judgment in excess of $13 million. App., *infra*, 11a.[5]

REASONS FOR GRANTING THE PETITION

This Court has recognized that the federal securities laws were not designed to federalize the "wide variety of corporate conduct traditionally left to state regulation." *Santa Fe Industries* v. *Green*, 430 U.S. 462, 478 (1977). Accordingly, federal regulation of proxy statements is addressed not to enforcing fiduciary duties imposed by state law, but to ensuring that issues calling for shareholder vote are "fairly presented." *Id.* at 474; see also *TSC Industries* v. *Northway, Inc.*, 426 U.S. 438, 444 (1976) (Section 14(a) "'was intended to promote the free exercise of the voting rights of stockholders'"). The substantive fairness of a transaction is, and always has been, a matter of state law. It follows that the damages awarded for a breach of the federal securities laws are not measured by what is needed to provide shareholders with an appraisal remedy, or a price that the jury determines would have been "fair." Rather, recovery is

[5] The liability of the individual directors on the state law claims arising out of this transaction is subject to a statutory cap and cannot exceed $2.3 million, no matter how large the class. See Va. Code Ann. § 13.1-692.1. Because the directors' liability under the federal count is greater than that under the state law count, and because the corporate petitioners were exonerated under the state law count, it is clear that the judgments below cannot be sustained on state law grounds alone.

limited by statute to "actual damages on account of the act complained of"—*i.e.*, damages caused by the alleged infraction of federal proxy law. 15 U.S.C. § 78bb(a). The Fourth Circuit's decision in this case cannot be squared with these principles and conflicts with appellate decisions from several other circuits.

First, by holding that a proxy statement violates federal law if it fails to accuse the directors of breaching their fiduciary duty and acting on selfish motivations, the decision expands the scope of federal proxy regulation to include the entire spectrum of state fiduciary law. The Fourth Circuit's open-ended view of disclosure obligations under Section 14(a) effectively exposes every proxy statement used in a merger transaction to burdensome class action litigation. It would be the rare case in which a plaintiffs' lawyer could not claim that the reasons given for the proposed corporate action were not the "real" ones and could not allege the existence of some unexpressed subjective motivation on the part of individual members of the board. By the same token, there would be no practical limit on the ability of plaintiffs' counsel to challenge the choice of words used in a proxy statement if, as the Fourth Circuit ruled in condemning the description of the investment banker in this case, each characterization of accurately disclosed facts is subject to editorial second-guessing by a jury. The rationale of the Fourth Circuit therefore raises "a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975), cited in *Santa Fe*, 430 U.S. at 479.

Second, by allowing plaintiffs to recover damages that were in no way caused by the alleged misrepresentations in the proxy statement, the Fourth Circuit has transformed federal proxy law into an insurance scheme for investors who can persuade a jury that there was a misstatement or omission in a proxy statement, even though

the alleged flaw could not have produced the loss complained of. This development runs counter to current state efforts (in Virginia and elsewhere) to contain directors' liabilities and to ensure that corporate decisions are not chilled by the specter of unlimited damages awards. This Court should not allow the implied cause of action under Section 14(a) to be stretched to the point that the traditional requirement of causation is completely eliminated.

There are important practical reasons for this Court to grant review in this case and to resolve the conflict among the circuits. The audience for proxy statements is a national and international one, and if plaintiffs within the Fourth Circuit have a right to recover multi-million dollar damages awards based on allegations such as these, the adverse impact on proxy statements, on corporate transactions, and on directors' willingness to serve on corporate boards will extend throughout the country. Under the liberal venue provisions of the federal securities laws (15 U.S.C. § 78aa), plaintiffs challenging a nationwide proxy solicitation can readily bring suit within the Fourth Circuit, making the legal rules announced in this case potentially applicable to virtually every proxy case. Thus, although other circuits have reached decisions that are inconsistent with the decision below, the sweeping rules that the Fourth Circuit has declared will have a disproportionate nationwide impact that makes it especially important that this Court take action to settle this significant area of law.

I. FEDERAL PROXY LAW REQUIRES DISCLOSURE OF MATERIAL FACTS BUT DOES NOT COMPEL DIRECTORS TO ACCUSE THEMSELVES OF BREACHING THEIR FIDUCIARY DUTY OR TO CHARACTERIZE DISCLOSED FACTS IN A PEJORATIVE MANNER.

The court of appeals predicated liability in this case on two alleged misrepresentations in the proxy statement. It is clear, however, that the court did not question the adequacy of the *facts* that were disclosed. Instead, it held

that petitioners were bound to characterize those facts pejoratively, even to the point of accusing themselves of harboring wrongful subjective motivations in breach of their fiduciary duty. The Fourth Circuit's decision conflicts with this Court's rulings and those of several other circuits that have squarely addressed these recurring legal issues. Unless this erroneous decision is reversed, corporations and directors nationwide will be threatened with immense liabilities for failing to disclose all of the intangible, subjective, and potentially conflicting motivating factors that might have entered their minds, or for failing to characterize disclosed facts in as pejorative a manner as the imagination of plaintiffs' counsel might suggest.

A. The Fourth Circuit's Holding That Directors Have A Duty To Disclose Their Subjective Motivations And Beliefs Is Incorrect And Inconsistent With Decisions Of This Court And Other Circuits.

One of the claims that the Fourth Circuit deemed to be legally sufficient was plaintiff Sandberg's allegation that the proxy statement concealed the directors' true subjective motivations for recommending approval of the merger and falsely stated that they believed the merger price was fair. Sandberg alleged that the directors' "real interest" was in retaining their positions on the Bank's board of directors and that the "Bank's directors were considerably less concerned with the stockholders' interests than with their own." App., *infra*, 15a. Notwithstanding the proxy statement's detailed disclosure of facts relevant to the directors' decision, the court of appeals ruled that its description of the directors' reasons for recommending the merger constituted a material misrepresentation: "the jury was certainly justified in believing that the directors did not believe a merger at $42 per share was in the minority stockholders' interest but, rather, that they voted as they did for other reasons, *e.g.*, retaining their seats on the board." *Ibid.*

The proxy statement contained all of the material facts necessary to permit an investor to evaluate whether the

directors were subject to a potential conflict of interest. The statement described the directors' large stock holdings, their occupations, and their length of service on the board, facts that tended to show the identity of the directors' interests with those of other minority shareholders. App., *infra*, 46a-50a. But the statement also explained that the directors were customers of the Bank, that they expected to continue to transact business with the Bank, and that they would remain on the Bank's board under the plan. *Id.* at 51a, 55a. The court of appeals never questioned the accuracy of these factual representations or identified any facts that were withheld. Instead, it ruled that petitioners had a duty under federal law not only to disclose facts about their relationship to the Bank, but also to speculate about and pejoratively characterize their subjective motivations and beliefs.

This ruling ignores the lesson of *Santa Fe*, which holds that the federal securities laws should not be construed to transform conventional state law actions for breach of fiduciary duty into federal suits. *Santa Fe* makes clear that implied remedies under the securities laws should not be expanded "to bring within [the statute] a wide variety of corporate conduct traditionally left to state regulation. * * * [T]his extension of the federal securities laws would overlap and quite possibly interfere with state corporate law." 430 U.S. at 478-479. These principles would be meaningless if alleged breaches of fiduciary duty could be recycled as securities fraud claims by the simple device of asserting that directors failed to accuse themselves of violating their fiduciary duty.

The rule adopted by the court of appeals in this case squarely conflicts with the legal standard applied in other circuits, which repeatedly have rejected "[e]fforts to dress up [state-law claims] in a § 14(a) suit of clothes [by] * * * including allegations of * * * failure to disclose an alleged ulterior motive." *Field* v. *Trump*, 850 F.2d 938, 947 (2d Cir. 1988); see also *Kas* v. *Financial General Bankshares, Inc.*, 796 F.2d 508, 513 (D.C. Cir. 1986) (*Santa Fe* holds that "failure to disclose * * *

'true' motivations of the directors * * * states no cause of action under the 1934 Act").

The Seventh Circuit's decision in *Kademian* v. *Ladish Co.*, 792 F.2d 614 (7th Cir. 1986), demonstrates just how far the panel in this case departed from the approach taken by other circuits. In *Kademian*, the company had issued a proxy statement listing six reasons why the directors favored the proposed merger. Plaintiffs claimed that these were not in fact the "true reasons," but that the directors favored the merger in order to protect themselves from having their prior wrongdoings exposed. The Seventh Circuit held as a matter of law that these alleged misstatements of the directors' motivations could not constitute actionable misrepresentations, explaining that "a plaintiff may not 'bootstrap' a state law claim into a federal case 'by alleging that the disclosure philosophy of the statute obligates defendants to reveal either the culpability of their activities, or their impure motives for entering the allegedly improper transaction.'" *Id.* at 622, quoting *Panter* v. *Marshall Field & Co.*, 646 F.2d 271, 288 (7th Cir. 1981). Federal securities laws, the court continued, are "not concerned that [defendants] made a statement that, if the plaintiffs were correct, was misleading since it was not the *true* reason management opposed the tender offer." *Kademian*, 792 F.2d at 624.

Other circuits have reached identical conclusions, diametrically opposed to the ruling of the Fourth Circuit in the instant case. See, *e.g.*, *Field*, 850 F.2d at 947; *Kas*, 976 F.2d at 513-515 ("federal securities laws do not impose any requirement that officers and directors or courts engage in public psychoanalysis about the real motives of corporate officers and directors for reaching a decision"); *Alabama Farm Bureau Mutual Casualty Co.* v. *American Fidelity Life Ins. Co.*, 606 F.2d 602, 610 (5th Cir. 1979) (there is no duty to disclose an "individual's motives or subjective beliefs"); *Biesenbach* v. *Guenther*, 588 F.2d 400, 401-402 (3d Cir. 1978) (there is no liability for an allegedly false statement that proposed transactions "were in the best interests of the shareholders and were designed to protect shareholders' financial interests"); *Golub* v. *PPD Corp.*, 576 F.2d 759, 765 (8th Cir. 1978) (federal law does not entitle shareholders to disclosure of the alleged "true motivation of * * * management in selling the assets of the company"). As the Third Circuit has declared: "The securities laws, while their central insistence is upon disclosure, were never intended to attempt any such measures of psychoanalysis or reported self-analysis." *Biesenbach*, 588 F.2d at 402; see also Ratner, "*Federal Corporation Law*" *Before and After Santa Fe Industries v. Green*, in *9th Annual Institute on Securities Regulation* 305, 322 (PLI 1978) ("It is not necessary to say, 'This is a grossly unfair transaction in which the board of directors is overreaching the minority shareholders.' You just have to give them the facts.").

This case provides a concrete example of how a sweeping extension of Section 14(a) can interfere with state corporate law. Concerned about the effects of directors' liability, Virginia, like many other states, amended its corporation laws in 1988 to protect directors in suits questioning their performance of duties and imposed a limit on directors' liability. See Va. Code Ann. § 13.1-692.1. Thus, even if a director were to breach a fiduciary duty, his liability would ordinarily be limited to the greater of $100,000 or his annual compensation from the corporation. *Ibid.*

This provision of Virginia law would limit the minority shareholders' recovery in this case to $2.3 million rather than the more than $13 million that could potentially flow from a successful federal securities law ruling giving what amounts to an appraisal remedy. App., *infra*, 32a-33a. A large number of other states have also modified their corporation laws to protect directors and corporations from the risk of huge liability. See 2 Model Business Corporation Act Annotated 1093 (3d ed. Supp. 1989); Hanks, *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnifica-*

tion, 43 Bus. Law. 1207 (1988). These states' policies would be frustrated and subverted if every claim of undisclosed breach of fiduciary duty exposed directors to unrestricted liability under the federal proxy laws. See *Santa Fe*, 430 U.S. at 479 (refusing to countenance an "extension of the federal securities laws" that "would overlap and quite possibly interfere with state corporate law").

The disadvantage of requiring disclosure of subjective motivations extends well beyond the effects such a rule would have on the relationship between state and federal law. The question of what subjective factors entered into any individual director's decision—much less the decision of an entire board of directors—opens up speculative fact issues that courts are ill-equipped to resolve. See *Data Probe Acquisition Corp.* v. *Datatab, Inc.*, 722 F.2d 1, 5 (2d Cir. 1983) (imposing a duty to disclose subjective motivations "assumes that boards of directors have monolithic viewpoints and threatens to burden the tender offer process with judicial oversight which yields little in the way of useful or new information but subjects tender offers to the delay inherent in judicial dockets"); *Kas*, 796 F.2d at 513 (federal law does not "require a court to probe the business judgment of the directors" in this way). Moreover, it is far from clear that shareholders would benefit from a proxy statement that speculated about all of the subjective and potentially conflicting factors that may have motivated each of the individual board members. See *TSC Industries*, 426 U.S. at 448-449 (warning that excessive exposure to liability will cause management to "bury the shareholders in an avalanche of trivial" and distracting information—"a result that is hardly conducive to informed decisionmaking"). Once the objective material facts, including facts that may suggest a potential conflict of interest, are fully disclosed, no goal of investor protection is served by requiring directors to castigate themselves or to declare—contrary to their own view—that they have acted on selfish motivations.

B. The Fourth Circuit's Holding That Directors Have A Duty To Pejoratively Characterize Facts They Disclose Is Incorrect And Inconsistent With Decisions Of This Court And Other Circuits.

The Fourth Circuit's second basis for liability was the proxy statement's description of KBW as "an independent investment banking firm" that FABI had commissioned "to pass on the fairness of the Merger from a financial point of view." App., *infra*, 16a. There is no dispute that KBW is a prominent investment banking firm specializing in evaluation of bank securities and that it was not affiliated in any way with FABI. The fact that KBW was retained by the majority shareholder and received internal information from it regarding the financial fairness of the merger was explicitly set forth in the proxy statement. App., *infra*, 54a. The proxy statement also fully disclosed the terms of the fee arrangement, which were typical of engagements of this kind: "For rendering its opinion to FABI, [KBW] will be paid $25,000, and if the Merger is consummated, will be paid an additional fee of $75,000". *Id.* at 55a. The court of appeals nonetheless sustained liability based on the use of the adjective "independent" to describe KBW. The court ruled that this word was false and misleading because KBW's fee arrangement created a potential conflict of interest and because KBW had knowledge of FABI's views on the issue of financial fairness. *Id.* at 16a.

The panel's ruling squarely conflicts with a consistent line of cases holding that the proxy laws are concerned with disclosure of material facts, not with characterizations of those facts. See *Golub*, 576 F.2d at 765 (plaintiffs had no right to have the proxy statement characterize the transaction "as plaintiffs would have it characterized"); *Kas*, 796 F.2d at 517 (a proxy statement "need not label or editorialize on the disclosed facts"); *Alabama Farm Bureau*, 606 F.2d at 611 (distinguishing between "characterization" and "fact"); *Goldberg* v. *Meridor*, 567 F.2d 209, 218 n.8 (2d Cir. 1977) (Friendly,

J.) (it is not deceptive for a proxy statement to fail to characterize disclosed facts with "pejorative nouns or adjectives"). The principle behind these decisions is obvious. Once the facts are fairly disclosed, a reasonable person cannot be deceived by the proxy statement's failure to "articulate adverse inferences from or pejorative descriptions of those facts." *Klamberg* v. *Roth*, 473 F. Supp. 544, 552 (S.D.N.Y. 1979).

The First Circuit's decision in *Lessler* v. *Little*, 857 F.2d 866, 875 (1st Cir. 1988), reflects the approach that the courts of appeals generally have taken. There, a shareholder attacked a proxy statement that recommended sale of the company's assets, alleging that the proxy statement was materially false because it described the arrangement as a "bona fide advisory contract rather than as a 'guise' or 'sham' to divert [the company's] assets." The court rejected the plaintiffs' claim as a matter of law, holding that once the relevant facts of the transaction are disclosed, a shareholder has "no grounds under the 1934 Act for complaining about management's choice of words" in describing them. *Id.* at 876; see also *Radol* v. *Thomas*, 534 F. Supp. 1302, 1315 (S.D. Ohio 1982) (description of an investment banking firm as "independent" cannot constitute a material misrepresentation). As Judge Friendly once put it: "Rare indeed is the proxy statement whose language could not be improved upon by a judicial craftsman sitting in the serenity of his chambers." *Kennecott Copper Corp.* v. *Curtiss-Wright Corp.*, 584 F.2d 1195, 1200 (2d Cir. 1978).

The possibility that a corporation and its directors will be exposed to huge liabilities based on the use of the word "independent" to describe a concededly unaffiliated investment banking firm is profoundly disturbing. There can be no doubt that KBW is one of the preeminent independent investment banking firms in the country that specializes in the banking industry (C.A. App. 590-591) and that the terms of its fee arrangement were fully revealed. Given the detailed disclosure of KBW's relationship with

FABI, the use of the adjective "independent" could not "have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Industries*, 426 U.S. at 449. Yet the Fourth Circuit held that use of the word "independent" was enough to sustain millions of dollars in liability and the stigma of having been found to have violated the federal securities laws. This Court should not close its eyes to the chilling effect that imposing liability over word choices like this will have on the willingness of civic, community and business leaders to serve on corporate boards. "Were such a rule applied, no [director] of character and responsibility would be found willing to accept such places." *Briggs* v. *Spaulding*, 141 U.S. 132, 149 (1891).

II. AN IMPLIED CAUSE OF ACTION FOR DAMAGES UNDER FEDERAL PROXY LAW REQUIRES PROOF OF TRANSACTION AND LOSS CAUSATION.

In *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 385 n.7 (1970), this Court explicitly left open the question whether causation in a Section 14(a) case "could be shown where the management controls a sufficient number of shares to approve the transaction without any votes from the minority." This case presents the Court with an opportunity to resolve that open issue, and to reaffirm that an implied cause of action under Section 14(a) is not an insurance scheme for disgruntled investors who would prefer to receive a higher premium for their shares.

The Fourth Circuit's elimination of the requirement of causation from the implied cause of action under Section 14(a) is a stark departure from the traditional requirement of a causal link between the wrong alleged and the damages awarded. The court held that millions of dollars in damages may be recovered if the proxy statement "contained material misrepresentations and was an essential link in the merger" (App., *infra*, 14a). The court reached that conclusion even though it acknowledged that the com-

bined vote of the minority shareholders could not block the merger transaction (*id.* at 12a) and even though the minority shareholders, armed with allegations of breach of fiduciary duty, attempted—but were totally unable—to block the merger or secure an appraisal remedy in state court (*id.* at 31a-33a). In these circumstances, it simply cannot be said that the two allegedly misleading assertions in the proxy statement *caused* either the merger transaction or the loss of $18 per share that the Fourth Circuit deemed to be plaintiffs' recoverable damages.

A. Recovery Under Section 14(a) Is Limited To Shareholders Who Are Injured By Distortion Of The Voting Process.

The purpose of Section 14(a) is "to prevent management or others *from obtaining authorization* for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 431 (1964) (emphasis added). Of course, it is often difficult to prove whether a proxy statement actually influenced enough votes to affect the outcome of the vote. Hence, this Court in *Mills* announced a presumption: if a shareholder can show that a proxy statement contains a material misstatement or omission it is generally presumed that the misstatement or omission affected the outcome of the vote. See *Mills*, 396 U.S. at 384-385. This approach is logical, inasmuch as the concept of materiality is itself defined by reference to what a reasonable shareholder would deem important in deciding how to vote. See *TSC Industries*, 426 U.S. at 449.

When the Court declared these principles, however, it recognized that there is one common situation in which this presumption does not logically apply. In what has since become famous to securities law specialists as "*Mills* footnote 7," the Court explained that it "need not decide in this case whether causation could be shown where the management controls a sufficient number of shares to approve the transaction without any votes from the minority." *Mills*, 396 U.S. at 385 n.7. The Court proceeded to provide a list of lower court decisions and academic commentaries that had disagreed on whether and how causation could be established in such a situation.

Since this Court's decision in *Mills*, the Second Circuit and a number of district courts have held that power to vote down a proposed merger is not necessary to a claim for damages under Section 14(a). See, *e.g.*, *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374, 382-383 (2d Cir. 1974); *Smillie* v. *Park Chemical Co.*, 466 F. Supp. 572, 577 (E.D. Mich. 1979); but see *Swanson* v. *American Consumers Industries*, 475 F.2d 516, 518 n.2 (7th Cir. 1973) (questioning this approach). Courts following the *Schlick* approach have suggested that even when it is clear that the proxy statement could have had no impact on the outcome of the vote, minority shareholders may still be able to establish causation by showing that an accurate proxy statement would have provided them with information necessary to enjoin the transaction in state court. See *Schlick*, 507 F.2d at 382-384; see generally Gelb, *Rule 10b-5 and Santa Fe—Herein of Sue Facts, Shame Facts, and Other Matters*, 87 W. Va. L. Rev. 189 (1985).

This rationale conflicts with the purposes of Section 14(a) and allows recovery of damages that are absolutely unrelated to the purported violation of the proxy laws. The purpose of Section 14(a) is to *protect the voting process*—not to create an adjunct discovery system to facilitate lawsuits in state court. Thus, if an alleged violation of Section 14(a) could not have affected the voting process, a private plaintiff should not be accorded an implied right of action under Section 14(a) simply to provide ammunition for a state court lawsuit.

This Court has followed that approach in closely-related contexts. In *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 26-41 (1977), for example, it stressed the need to identify the precise interests Congress sought to protect in order to determine how broadly courts should extend an implied

cause of action under the securities laws. Because the focus of the Williams Act was the protection of investors confronted with tender offers, and not protection of unsuccessful tender offerors who might be injured by Section 14(e) violations, the Court held in *Piper* that recognizing a private cause of action for tender offerors was not "necessary to effectuate Congress' goals." *Id.* at 26. So, too, with respect to Section 14(a): Congress's interest was protecting shareholders' votes, and injuries unrelated to voting are unrelated to the goals of the statute. Certainly it cannot be said that extending Section 14(a) to non-voting injuries is "necessary to effectuate Congress's goals." *Piper*, 430 U.S. at 26; *Santa Fe*, 430 U.S. at 477-480.

When the Second Circuit announced its contrary position in *Schlick*, this Court had not yet begun to stress the serious federalism concerns occasioned by expansive judicial creation of implied causes of action under the federal securities laws. As one commentator recently observed: "It is highly questionable whether [*Schlick* and the cases following it] are consistent with the Supreme Court's concern of freeing the federal courts from claims that are based on state law and breaches of fiduciary duties." T. Hazen, *Treatise on the Law of Securities Regulation* 670 (2d ed. 1990). In light of these general concerns and the serious questions about the implied private cause of action under Section 14(a) in particular,[6] review is

[6] A number of Justices have questioned the correctness, as an original matter, of *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), which recognized an implied private cause of action under Section 14(a). See, *e.g.*, *Carlson* v. *Green*, 446 U.S. 14, 39-40 n.5 (1980) (Rehnquist, J., dissenting) ("In light of this Court's recent decisions * * * it is clear that there is nothing left of the rationale of *Borak*"); *Cannon* v. *University of Chicago*, 441 U.S. 677, 735-736 (1979) (Powell, J., dissenting) ("I find [*Borak*] both unprecedented and incomprehensible as a matter of public policy. * * * [It] constitutes a singular and, I believe, aberrant interpretation of a federal regulatory statute"). Cf. *Thompson* v. *Thompson*, 484 U.S. 174, 190 (1988) (Scalia, J., concurring in the judgment) ("this Court has long since abandoned its hospitable attitude towards implied rights of action. In the 23 years since * * * [*Borak*] we have *twice* narrowed the test for implying a private right"); *id.* at 188 (O'Connor, J., concurring) (same). Whether or not the Court is inclined to overrule *Borak*, these concerns counsel strongly against extending it even further than it has already been extended. See *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 234 (1987) ("While *stare decisis* concerns may counsel against upsetting [*Wilko* v. *Swan*'s contrary conclusion * * * we refuse to extend *Wilko*'s reasoning * * *").

needed in this case to prevent the implied cause of action from extending to extraneous injuries unrelated to shareholder voting.

B. Even If Non-Voting Injuries Are Cognizable Under Section 14(a), Actual Causation Must Still Be Proved.

Even if the implied cause of action under Section 14(a) is broad enough to encompass non-voting injuries, the Fourth Circuit's application of *Schlick* rests on hypotheses of causation that are far too attenuated and speculative to support liability. See *Swanson*, 475 F.2d at 518 n.2 (7th Cir. 1973) (questioning whether the "orthodox standard of causation in tort law should be cast aside entirely," as it would have to be to allow recovery on speculative non-voting theories of causation); see generally *Piper*, 430 U.S. at 52 (Blackmun, J., concurring) ("even if one presumes that the shareholders [would have taken action] if they had known the truth, there is still no way of knowing what course the contest would have taken from that point onward").

The traditional "materiality" inquiry, which serves as a surrogate for causation in some proxy cases, has no logical relation to causation in a case such as this one. A misstatement or omission is deemed "material" under the *TSC* standard because of its potential to alter the outcome of the vote, but that says nothing about its impact in a non-voting context. As the Seventh Circuit has explained:

> While a determination that a misstatement or omission in a proxy statement is material "indubitably

> embodies a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote" (*Mills*, [396 U.S. at 384]), it hardly embodies a conclusion that the non-controlling minority might have somehow, apart from their voting power, prevented the merger from taking place on the terms proposed.

Swanson, 475 F.2d at 518 n.2. It is obvious that if non-voting causation is to be recognized at all in the Section 14(a) context the causation inquiry cannot focus, as it does in voting cases, on what a reasonable investor would consider important in deciding how to vote. It is equally obvious that "the causal connection" must be deemed "broken" by "[a]ny showing that severs the link between the alleged misrepresentation and * * * the price received * * * by the plaintiff." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 248 (1988).

This Court's decision in *Santa Fe*—which was handed down three years after *Schlick*—makes clear that speculative causation claims are not sufficient in this context. In *Santa Fe*, minority shareholders complained not only of unfairness in a so-called "freeze-out" merger, but also of failure to disclose material facts regarding the merger plan. They alleged that their injury was caused by "the majority stockholder's failure to give the minority [shareholders] advance notice of the merger." 430 U.S. at 474 n.14. This Court rejected that claim as a matter of law, refusing to speculate about how the information at issue might have assisted the minority shareholders (*ibid.*):

> [R]espondents do not indicate how they might have acted differently had they had prior notice of the merger. Indeed, they accept the conclusion of both courts below that under Delaware law they could not have enjoined the merger because an appraisal proceeding is their sole remedy in the Delaware courts for any alleged unfairness in the terms of the merger. Thus, the failure to give advance notice was not [actionable under] the statute or the Rule.

Moreover, even if the speculative causation theories referred to in *Schlick* did somehow survive *Santa Fe*, the Fourth Circuit's ruling in this case could not stand. It goes far beyond the reasoning of *Schlick* or any other decision by sustaining liability even though plaintiff Sandberg made no showing whatsoever that the misstatements she complained of could have had any impact on her ability to prevent the merger. In fact, a group of the Bank's minority shareholders, armed with allegations of breach of fiduciary duty (derived largely from facts disclosed in the proxy statement), was wholly unsuccessful in its efforts to enjoin the merger in state court. See pp. 5-6, *supra*. Neither *Schlick* nor any other case before this one reads proof of causation entirely out of the private cause of action.[7]

As the Second Circuit held ten years after its decision in *Schlick*, to prevail in non-voting cases plaintiffs must demonstrate "that they would have succeeded" in preventing the merger "if they had been advised of the truth and had pursued [their available] remedies." *Madison Consultants* v. *FDIC*, 710 F.2d 57, 64 (2d Cir. 1983). Although the circuits have disagreed about the precise nature of this showing, most of them require distinct, non-speculative proof that the merger plan would have been blocked by the disclosure at issue. See *Kidwell ex rel. Penfold* v. *Meikle*, 597 F.2d 1273, 1294 (9th Cir. 1979) (the plaintiff must show that he would have actually succeeded in securing relief in state court); *Healey* v. *Catalyst Recovery of Pennsylvania, Inc.*, 616 F.2d 641, 647 (3d Cir. 1980) (the plaintiff must show a reasonable probability of success in state court); *Alabama Farm Bureau*, 606 F.2d at 614 (the plaintiff must show that

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[7] Although *Schlick* spoke of the opportunity to establish that an accurate proxy statement would have allowed the plaintiff to obtain relief in state court, it cautioned that "[c]ausality, we think is sufficiently pleaded; *the proof may, of course, be something else.*" 507 F.2d at 383 (emphasis supplied). That proof was wholly absent here.

he could make out a prima facie case for relief in state court).[8]

In this case, the lower courts never asked any of these questions because they misread *Schlick* as dispensing totally with the element of causation. App., *infra*, 13a-14a. The effect of that manifest error here was to expose petitioners to millions of dollars in liability even though plaintiffs never showed—and could not show—that the supposedly misleading proxy statement caused them any injury or affected their rights in any way. It is evident that the lower courts in this case have totally overlooked the need to establish how the challenged errors in the proxy statement *caused* the amount of damages claimed.[9] In so doing, they have disregarded the precept that "any extension of [the federal securities] laws, to approach something closer to an investor insurance scheme, should come from Congress, and not from the courts." *Basic Inc.*, 485 U.S. at 256-257 (White and O'Connor, JJ., concurring in part and dissenting in part).

By undertaking review of the causation question, this Court will be able (1) to decide whether theories of nonvoting causation are ever cognizable under Section 14(a), and (2) if so, to define the appropriate standard of proof. These issues have been the subject of frequent disagreement and uncertainty in the lower courts following this Court's decision in *Santa Fe*. In view of the substantial volume of litigation that *Santa Fe*'s causation ruling has engendered, one commentator has remarked

[8] Although these cases have arisen under Rule 10b-5, the *Santa Fe* causation analysis extends to Section 14(a) as well. See L. Loss, *Fundamentals of Securities Regulation* 809 (1988) (discussing cases); R. Jennings & H. Marsh, *Securities Regulation* 1287 (6th ed. 1987) (the standard of causation under Section 14(a) is certainly as strict as under Rule 10b-5).

[9] The securities laws embody "the standard rule of tort law that the plaintiff must allege and prove that, but for the defendant's wrongdoing, the plaintiff would not have incurred the harm of which he complains." *Bastian* v. *Petren Resources Corp.*, 892 F.2d 680, 685 (7th Cir. 1990) (Posner, J.).

that "[o]ne would hope * * * that such an important issue [will] be fully considered" by the Supreme Court. 3B H. Bloomenthal, *Securities and Federal Corporate Law* § 11.20[3] at 11-118 (rev. ed. 1989).[10] This case presents the Court with an excellent opportunity not only to clarify this important area of securities law, but to reverse the clearly erroneous decision that the Fourth Circuit has rendered on these issues.

III. A REVIEWING COURT MAY NOT UPHOLD A GENERAL JURY VERDICT THAT MIGHT HAVE BEEN BASED ON AN INVALID THEORY OF LIABILITY.

The trial court allowed the jury in *Sandberg* to consider six alleged misrepresentations in the proxy statement. Because the jury's verdict may have rested on any one of those allegations, there is no way to determine which allegation the jury actually relied upon in awarding damages. Nonetheless, the court of appeals considered it unnecessary to decide whether all or even most of the six allegations were supportable. The court declared that "the submission of both correct and incorrect factual bases supporting a single theory of recovery is not grounds for reversal of a judgment on a general verdict." App., *infra*, 17a. The court contrasted these "factual bases" with the submission of incorrect legal theories, which it acknowledged would require reversal. The Fourth Circuit's ruling is directly contrary to this Court's precedents and exacerbates a significant split among the circuits.

In reviewing general verdicts, this Court has never recognized a distinction between defective legal theories and inadequate "factual bases." In *Wilmington Star Mining Co.* v. *Fulton*, 205 U.S. 60, 78-79 (1907), the Court ruled that there was insufficient evidence to support one of the eight factual claims that had been sub-

[10] For a list of scholarly efforts to grapple with this aspect of *Santa Fe* and the many cases interpreting it, see R. Jennings & H. Marsh, *Securities Regulation* 1091-1092 (6th ed. 1987) (listing 17 articles on the subject).

mitted to the jury. *Id.* at 77-78. "Under this condition of things," the Court found "it impossible to say that prejudicial error did not result." *Id.* at 78. In a holding that directly governs this case, the Court declared that a jury verdict cannot be sustained

> where a jury is wrongfully permitted over the objection of the opposing party to take into consideration in reaching a verdict counts of a declaration which have not been supported by any evidence, and where it is impossible from the record to say upon which of the counts of the declaration the verdict was based.

Id. at 79. This Court has reaffirmed that principle on a number of occasions. See, *e.g.*, *Sunkist Growers, Inc.* v. *Winckler & Smith Co.*, 370 U.S. 19, 29-30 (1962); *United Pilots Ass'n* v. *Halecki*, 358 U.S. 613, 618-619 (1959).

Given these binding precedents, it is difficult to understand how the Fourth Circuit reached the decision that it did, although its approach finds support among a few other circuits. See, *e.g.*, *Culli* v. *Marathon Petroleum Co.*, 862 F.2d 119, 123 (7th Cir. 1988). The majority of circuits have, consistent with this Court's holdings, taken the opposite position. These courts have held that a jury's general verdict may not be sustained unless the reviewing court is confident that the jury rested the verdict on a set of facts that can support liability. See *McMurray* v. *Deere & Co.*, 858 F.2d 1436, 1444 (10th Cir. 1988); *Dudley* v. *Dittmer*, 795 F.2d 669, 672-673 (8th Cir. 1986); *Syufy Enterprises* v. *American Multicinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986); *Murphy* v. *United States*, 653 F.2d 637, 646 (D.C. Cir. 1981); *Brochu* v. *Ortho Pharmaceutical Corp.*, 642 F.2d 652, 662 (1st Cir. 1981); *Yentsch* v. *Texaco, Inc.*, 630 F.2d 46, 59 (2d Cir. 1980); *Avins* v. *White*, 627 F.2d 637, 646 (3d Cir. 1980); *Smith* v. *Southern Airways, Inc.*, 556 F.2d 1347, 1347-1348 (5th Cir. 1977).

Beyond this, the present case falls on the legal side of the factual/legal dichotomy the Fourth Circuit hypothesized.

Petitioners did not limit their challenge to respondents' case to its factual deficiencies. They also contended (App., *infra*, 14a-17a) that the statements were "immaterial as a matter of law."[11] Lack of materiality may, depending on the context, be a pure question of law or a "mixed question of law and fact," *TSC Industries*, 426 U.S. at 450. It is not, in any event, the kind of pure factual deficiency that a court can presume a jury would have understood. The materiality inquiry is a sophisticated legal analysis that implicates issues of statutory policy and federalism. To simply assume that the jury would not have relied on legally immaterial counts deprived petitioners of their right to meaningful appellate review of the jury's verdict.[12]

The Fourth Circuit's affirmance of the general verdict threatens a serious miscarriage of justice. In this case the jury's verdict of $43,956 has already been parlayed into $3.3 million through invocation of nonmutual offen-

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[11] These arguments were made repeatedly throughout the proceedings. See C.A. 944-945 (motion for directed verdict); Brief in Support of Defendants Virginia Bankshares, Inc.'s, and First American Bankshares, Inc.'s Motion for Summary Judgment at 30-47.

[12] There is no basis for the Fourth Circuit's extraordinary suggestion (App., *infra*, 17a-18a) that petitioners waived this claim by acquiescence in an instruction. The instruction in question stated only that the plaintiff "must prove by a preponderance of the evidence that the defendants made *one or more* of the misrepresentations of fact as alleged or omitted to state facts which would be necessary to make other statements by the defendants not misleading to the plaintiff." *Ibid.* There was nothing wrong with this instruction, because, assuming petitioners could be liable at all, that liability need rest on only one factually and legally supportable ground. But this instruction has nothing to do with the question of *the court's* duty to ensure that the verdict rests on a supportable basis. In the J.N.O.V. hearing, counsel for the corporate defendants clearly argued that "if only one of the six violations doesn't pass muster, it should not have been sent to the jury. There would have to be a new trial as well, for the simple reason that we have no way of knowing why the jury found under the 14(a) counts." C.A. App. 1336.

sive collateral estoppel. Petitioners are threatened with a further enlargement of that judgment as a result of the Fourth Circuit's class action ruling. Extension of the damages award to the entire class of minority shareholders would create a judgment nearly 300 times larger than the damages award rendered by the jury. This sweeping use of offensive collateral estoppel would be dubious in its own right, even if it were clear that the jury reached a verdict that is legally sustainable. It is surely intolerable when there is no way of determining whether the jury ever found petitioners liable on any sustainable allegation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 88-2658 to 88-2660, 88-2662 to
88-2664, 89-2903, 89-2904

DORIS I. SANDBERG, individually and on
behalf of other minority stockholders,
Plaintiff-Appellant,

v.

VIRGINIA BANKSHARES, INC.; FIRST AMERICAN BANKSHARES, INC.; JACK W. BEDDOW; MILTON L. DREWER, JR.; E. GUY RIDGELY; EMANUEL A. BAKER, JR.; HARRIET F. BRADLEY; JOEL T. BROYHILL; THOMAS B. CHAMBERLIN; THOMAS P. CHISMAN; SIDNEY O. DEWBERRY; ERIC W. ERDOSSY; GEORGE W. JOHNSON; CHARLES T. LINDSAY, JR.; DONALD R. MAXFIELD; LINDA H. MICHAEL; MILTON V. PETERSON; GLENN W. SAUNDERS, JR.; CHARLES H. SMITH, JR.; VERLIN W. SMITH; HENRY A. THOMAS; STEPHEN G. YEONAS,
Defendants-Appellees,

THOMAS G. MAYS; DWIGHT C. SCHAR,
Defendants. (Two Cases)

DORIS I. SANDBERG, individually and on
behalf of other minority stockholders,
Plaintiff-Appellee,

v.

JACK W. BEDDOW; MILTON L. DREWER, JR.; E. GUY RIDGELY; EMANUEL A. BAKER, JR.; HARRIET F. BRADLEY; JOEL T. BROYHILL; THOMAS B. CHAMBERLIN;

THOMAS P. CHISMAN; SIDNEY O. DEWBERRY; ERIC W. ERDOSSY; GEORGE W. JOHNSON; CHARLES T. LINDSAY, JR.; DONALD R. MAXFIELD; LINDA H. MICHAEL; MILTON V. PETERSON; GLENN W. SAUNDERS, JR.; CHARLES H. SMITH, JR.; VERLIN W. SMITH; HENRY A. THOMAS; STEPHEN G. YEONAS,

Defendants-Appellants,

and

VIRGINIA BANKSHARES, INC.;
FIRST AMERICAN BANKSHARES, INC.;
THOMAS G. MAYS; DWIGHT C. SCHAR,

Defendants.

DORIS I. SANDBERG, individually and on behalf of other minority stockholders,

Plaintiff-Appellee,

v.

VIRGINIA BANKSHARES, INC.;
FIRST AMERICAN BANKSHARES, INC.,

Defendants-Appellants,

and

JACK W. BEDDOW; MILTON L. DREWER, JR.; E. GUY RIDGELY; EMANUEL A. BAKER, JR.; HARRIET F. BRADLEY; JOEL T. BROYHILL; THOMAS B. CHAMBERLIN; THOMAS P. CHISMAN; SIDNEY O. DEWBERRY; ERIC W. ERDOSSY; GEORGE W. JOHNSON; CHARLES T. LINDSAY, JR.; DONALD R. MAXFIELD; THOMAS G. MAYS; LINDA H. MICHAEL; MILTON V. PETERSON; GLENN W. SAUNDERS, JR.; DWIGHT C. SCHAR; CHARLES H. SMITH, JR.; VERLIN W. SMITH; HENRY A. THOMAS; STEPHEN G. YEONAS,

Defendants.

PAUL H. WEINSTEIN, *et al.*,

Plaintiffs-Appellees,

v.

JACK W. BEDDOW; MILTON L. DREWER, JR.; E. GUY RIDGELY; EMANUEL A. BAKER, JR.; HARRIET F. BRADLEY; JOEL T. BROYHILL; THOMAS B. CHAMBERLIN; THOMAS P. CHISMAN; SIDNEY O. DEWBERRY; ERIC W. ERDOSSY; GEORGE W. JOHNSON; CHARLES T. LINDSAY, JR.; DONALD R. MAXFIELD; LINDA H. MICHAEL; MILTON V. PETERSON; GLENN W. SAUNDERS, JR.; CHARLES H. SMITH, JR.; VERLIN W. SMITH; HENRY A. THOMAS; STEPHEN G. YEONAS,

Defendants-Appellants,

and

VIRGINIA BANKSHARES, INC.;
FIRST AMERICAN BANKSHARES, INC.,

Defendants.

PAUL H. WEINSTEIN, *et al.*,

Plaintiffs-Appellees,

v.

VIRGINIA BANKSHARES, INC.;
FIRST AMERICAN BANKSHARES, INC.,

Defendants-Appellants,

and

JACK W. BEDDOW; MILTON L. DREWER, JR.; E. GUY RIDGELY; EMANUEL A. BAKER, JR.; HARRIET F. BRADLEY; JOEL T. BROYHILL; THOMAS B. CHAMBERLIN; THOMAS P. CHISMAN; SIDNEY O. DEWBERRY; ERIC W. ERDOSSY; GEORGE W. JOHNSON; CHARLES T. LINDSAY, JR.; DONALD R. MAXFIELD; LINDA H. MICHAEL; MILTON V. PETERSON; GLENN W. SAUNDERS, JR.; CHARLES H. SMITH, JR.; VERLIN W. SMITH; HENRY A. THOMAS; STEPHEN G. YEONAS,

Defendants.

PAUL H. WEINSTEIN, *et al.*,
Plaintiffs-Appellants,

v.

VIRGINIA BANKSHARES, INC.; FIRST AMERICAN BANKSHARES, INC.; JACK W. BEDDOW; MILTON L. DREWER, JR.; E. GUY RIDGELY; EMANUEL A. BAKER, JR.; HARRIET F. BRADLEY; JOEL T. BROYHILL; THOMAS B. CHAMBERLIN; THOMAS P. CHISMAN; SIDNEY O. DEWBERRY; ERIC W. ERDOSSY; GEORGE W. JOHNSON; CHARLES T. LINDSAY, JR.; DONALD R. MAXFIELD; LINDA H. MICHAEL; MILTON V. PETERSON; GLENN W. SAUNDERS, JR.; CHARLES H. SMITH, JR.; VERLIN W. SMITH; HENRY A. THOMAS; STEPHEN G. YEONAS,
Defendants-Appellees (Two Cases).

Argued June 7, 1989

Decided Dec. 15, 1989

Before HALL, Circuit Judge, GORDON, Senior United States District Judge for the Middle District of North Carolina, sitting by designation, and VOORHEES, United States District Judge for the Western District of North Carolina, sitting by designation.

K.K. HALL, Circuit Judge:

First American Bankshares, Inc. ("FABI"), its wholly-owned subsidiary, Virginia Bankshares, Inc. ("VBI" and, collectively with FABI, "Bankshares"), First American Bank of Virginia ("Bank"), and various directors of the Bank, were defendants below in each of these two cases. In *Sandberg*, they appeal from the judgment entered on a jury verdict for the plaintiff, Doris Sandberg, based on

federal securities law violations and state law breach of fiduciary duties. In *Weinstein II*, they appeal from a summary judgment entered on the basis of the *Sandberg* judgment on behalf of sixteen plaintiffs. Sandberg cross-appeals from the denial of her motion for class certification, and the *Weinstein II* plaintiffs cross-appeal from the district court's imposition of a cap on the maximum liability of the individual Bank directors on the state law claims. Both Sandberg and the *Weinstein II* plaintiffs cross-appeal from the denial of attorneys' fees in their respective actions. Finding no error in the trial of the *Sandberg* action, we affirm that judgment; however, we find that the lower court erred in denying class certification, and remand for entry of an appropriate order. In light of our rulings, we remand for reconsideration of the denial of attorneys' fees in *Sandberg*. We find no error in the grant of summary judgment to the *Weinstein II* plaintiffs, in the denial of attorneys' fees or in the imposition of a cap on each director's liability and, accordingly, we affirm.

I. FACTS

These cases arise from FABI's decision to seek a merger of the Bank with VBI through the purchase by VBI of the 15% of the Bank stock owned by the minority stockholders. Although VBI's ownership of 85% of the Bank's stock was sufficient for approval of the merger, Virginia law required the Bank's directors to issue a proxy statement recommending the plan of merger and to call a stockholders' meeting to vote on the merger. Va.Code Ann. § 13.1-718(B)(1) (1989). The activities of Bankshares and the Bank's directors surrounding this merger, particularly the issuance of the proxy statement, form the basis of the damage actions brought by various minority stockholders.

FABI retained an investment advisor, Keefe, Bruyette and Woods [KBW] to furnish an opinion regarding a "fair price" to pay for the minority-held shares. KBW

submitted its opinion that $42 per share was fair. Through arrangements made by Jack Beddow, an officer of both FABI and the Bank, KBW made a presentation to a small group of the Bank's directors and stockholders on January 29, 1987. On the same day, the Bank's executive committee members present at this presentation drafted a two-sentence statement recommending that the board of directors accept FABI's tender offer of $42 per share. At the board meeting held on February 12, 1987, the Bank's directors voted to approve the merger and to recommend to the minority stockholders that they accept the $42 per share offer. No independent investment advisor was retained by the Bank to determine a fair value for the minority-held stock.

A proxy statement was prepared and sent to each stockholder. At the April 21, 1987, stockholders' meeting, the merger proposal garnered 85% of the minority stockholders' votes. On May 27, 1987, the merger was consummated and the minority-held stock was converted to a right to receive $42 per share.

One week prior to the April 21, 1987, stockholders' meeting, Paul Weinstein and twelve other minority stockholders filed suit in Virginia state court to enjoin defendants from effecting the proposed merger and to enjoin any merger which did not provide a "fair price per share" to the minority stockholders. (*Weinstein I*). This request was denied. The complaint was then amended to add three plaintiffs and to include a claim for damages against VBI and the Bank's directors for breach of state law fiduciary duties. This amended complaint prayed for an equitable appraisal pursuant to Va.Code Ann. § 13.1-730 (1989). By order dated October 16, 1987, the amended complaint was dismissed, and the *Weinstein I* plaintiffs' appeal of this order to the Supreme Court of Virginia was pending when the *Sandberg* and *Weinstein II* judgments were entered.

A. *Sandberg*

After the merger, Doris Sandberg, a Bank stockholder who owned 2,442 shares, filed a class action in federal district court claiming violations of federal securities laws and breach of fiduciary duties imposed by state law. Her complaint described the putative plaintiff class as "all former shareholders of [the Bank], excluding defendants" which she alleged to consist of approximately 2,017 persons. Named as defendants were FABI, VBI, and individual directors of the bank. The crux of Sandberg's complaint was that the Bank's proxy solicitation contained material misrepresentations and omitted important facts. More particularly, she alleged that Bankshares orchestrated the entire merger and, abetted by an unquestioning and compliant Bank board of directors, led the minority shareholders to believe that $42 per share was a reasonable price when in fact the stock was worth substantially more.

Class certification was denied and the case proceeded to trial. The jury found that the shares were worth an additional $18 each and awarded Sandberg $43,956 on each claim; judgment was entered upon the verdict for this amount. The judgment is against all defendants, jointly and severally, on Count I (federal securities law); an "alternative" judgment was entered against only the Bank's directors on Count II (state fiduciary duties). Sandberg's motion for attorneys' fees was denied. Each defendant appeals from the judgment, and Sandberg cross-appeals from the denial of class certification and the denial of attorneys' fees.

B. *Weinstein II*

In August 1988, Paul Weinstein and sixty-eight other minority stockholders filed suit in the federal district court for the District of Columbia. This action was transferred to the court in which *Sandberg* was pending and the complaint was amended to mirror the *Sandberg* com-

plaint. After the judgment was rendered in *Sandberg*, the *Weinstein II* plaintiffs invoked the doctrine of offensive collateral estoppel and moved for summary judgment. The district court granted the motion and entered judgment for the plaintiffs in an amount calculated on the basis of an additional $18 for each share of Bank stock owned by the plaintiffs at the time of the merger (total: $3,292,236). Pursuant to Va.Code Ann. § 13.1-692.1 (1989), the trial court imposed a cap on the individual liability of each Bank director on the judgment on the state law claim. The defendants appeal from the judgment, and the *Weinstein II* plaintiffs cross-appeal from the imposition of the liability caps as well as from the denial of attorneys' fees. We first address the issues raised by the appeals in *Sandberg*.

II. CLASS CERTIFICATION

The putative class in *Sandberg* was alleged to consist of all non-defendant stockholders. In a bench ruling, the district court denied Sandberg's motion for class certification on the following grounds: (1) since Sandberg voted against the merger, she was not typical of the class (less than 15% of the minority shareholders voted against the merger); (2) the sixteen plaintiffs in *Weinstein I* could not be members of the class; (3) a conflict of interest existed in that Sandberg's law firm had previously represented one of the defendant directors; and (4) other stockholders had shown little interest in the suit. Bankshares also contends that class certification was properly denied because individual questions predominated over common ones. Sandberg contends that she was an adequate representative of the class, and that the other prerequisites of certification were met. We hold that the district court erred in denying certification of a class consisting of all minority stockholders. *See generally In re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir.1989) (trend is to give Rule 23 a liberal construction).

Fed.R.Civ.P. 23(a)(4) requires that the class representative be capable of fairly and adequately representing the interests of the class. The primary reason given by the district court for its denial of certification was the fact that Sandberg, unlike most of the minority stockholders, voted against the merger and thus obviously did not rely on the alleged material misrepresentations in the proxy statement. As discussed below in Part III, however, her lack of reliance has no bearing on the determination of liability on Sandberg's claims. Inasmuch as reliance is not a factor, it cannot be said that Sandberg's vote against the merger acted to make her interests antagonistic to the other minority stockholders. Indeed, it is difficult to imagine why any stockholder would not immediately embrace Sandberg's representation of their interests and the opportunity to receive more money for his Bank shares. In basing its denial of certification on this ground, the lower court erred as a matter of law.

The potential conflict arising out of the prior representation of a defendant-director also implicates the Rule 23 requirement of an adequate representative. Sandberg's law firm had previously represented director Dwight Schar in some personal legal matters, but Schar was voluntarily dismissed soon after the complaint was filed. On appeal, Sandberg asserts that Schar and another defendant director were dropped as parties because neither had attended the two Bank board meetings at which the VBI merger had been discussed and voted upon. Bankshares responds that Sandberg knew of such defenses prior to filing the complaint but dismissed Schar only after realizing the possible conflict. Regardless of the true motivation, the fact remains that Schar had been dismissed as a party prior to the certification motion and that his nonattendance at the critical board meetings arguably constituted a complete defense to both the federal and state claims. We are unable to see how Sandberg's representation was in any way compromised by this alleged conflict.

The lower court's reliance on this basis was an abuse of discretion.

The fact that sixteen stockholders were simultaneously pursuing state court remedies also does not constitute an adequate ground for denial of certification. The lower court stated that inclusion of the sixteen "could cause considerable difficulty with them being a part of the class action . . . [if they] ultimately could not be members of the class." If this had been the only apparent impediment, the preferable solution would have been to define the *Sandberg* class as consisting of all minority stockholders except the sixteen who were litigating in state courts. These sixteen stockholders could then have been placed in a subclass pending resolution of their state court action. We believe that denial of certification was clearly inimical to the purposes for which the class action procedure was intended. Faced with a putative class of approximately 2,000 minority stockholders, it was an abuse of discretion to deny certification on the ground that sixteen members might be eventually barred from relief by *res judicata*.

The lower court also based its decision on a lack of interest by other stockholders in the *Sandberg* action. No basis for this finding is given, and we are unable to discern how this lack of interest may have manifested itself. Moreover, even assuming such a lack of interest, we are unable to find legal significance in it. We believe that the court abused its discretion in relying on this factor to deny class certification.

Unlike the situation in *Zimmerman v. Bell*, 800 F.2d 386 (4th Cir.1986), there were no individual questions of law or fact to predominate over the common ones. In fact, the only questions presented with regard to the federal law claim were (1) did the proxy statement contain a material misrepresentation or omit a material fact, (2) if so, was the proxy statement an "essential link" in the merger, and (3) if so, what were the damages suffered; the state law claim involved only the question of whether the

directors acted in good faith. Only a single proxy statement was involved, and damages were determinable on the basis of the value of a share of stock, so the only individual questions were how many shares of stock each shareholder owned. The defendants' contention that individual questions predominated is without any basis whatsoever. *Pellman v. Cinerama, Inc.*, 89 F.R.D. 386, 289 (S.D.N.Y. 1981).

The lower court's denial of certification was based on the clearly erroneous legal conclusion that Sandberg was not a proper class representative because she did not rely on the alleged misrepresentations in the proxy statement. We further find that the lower court abused its discretion in denying certification on the grounds of possible conflict of interest or lack of interest. Finally, we find that the then-pending state court action did not present a sufficient obstacle to certification of a class consisting of all other minority stockholders. Accordingly, the order denying class certification will be reversed and the case remanded for entry of an order certifying a class.

III. RELIANCE

Bankshares and the directors contend that, even assuming that the proxy statement contained material misrepresentations or omitted material facts, only a presumption of reliance by a stockholder plaintiff arises and, in *Sandberg*, this presumption is conclusively rebutted by Sandberg's admitted lack of reliance on such misrepresentations or omissions. We hold, however, that reliance is not an element of a § 14(a) action; therefore, the defendants' argument fails.

Section 14(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78n(a) (1981)) makes unlawful the solicitation of a proxy in respect of any registered security in contravention of rules prescribed by the Securities and Exchange Commission. One such rule, 12 C.F.R. § 335-206, provides as follows:

No solicitation or communication subject to this Subpart B shall be made by means of any statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement that, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or that omits to state any material fact necessary in order to make the statement therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter that has become false or misleading. Depending upon particular circumstances, the following may be misleading within the meaning of this paragraph: Predictions as to specific future market values, material that directly or indirectly impugns character, integrity, or personal reputation, or directly or indirectly makes charges concerning improper, illegal, or immoral conduct or associations, without factual foundation; failure to so identify a statement, form of proxy, and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter; claims made prior to a meeting regarding the results of a solicitation.

It is undisputed that this section has given rise to an implied private right of action for damages incurred by aggrieved stockholders. *V.I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964). The threshold issue in these appeals is the effect of Sandberg's admitted lack of reliance on the alleged misrepresentations on her right to recover damages.

In *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), the Supreme Court was confronted with a similar suit by a class of stockholders alleging violations of § 14(a) by means of a false

and misleading proxy statement. Stressing the importance of informed voting, but recognizing the impracticality of attempting to determine the extent of reliance by thousands of stockholders on alleged misrepresentations in the proxy statement, the Court held that a finding that the misrepresentations and/or omissions were material sufficed to establish the causal relationship between violation and injury if it is further shown that the proxy statement itself was an essential link in the accomplishment of the transaction for which the proxy was sought.[1] *Id.* at 385, 90 S.Ct. at 622.

More recently, in the context of a case brought for violations of Section 10(b) of the Securities Exchange Act of 1934, the Court held that the presumption of reliance flowing from a finding of materiality is merely a rebuttable presumption. *Basic, Inc. v. Levinson*, 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988). Contrary to the defendants' argument, however, the rebuttable presumption in § 10(b) actions is not applicable to § 14(a) actions. The Court stated that a finding of reliance serves to provide "the requisite causal connection between a defendant's misrepresentations and a plaintiff's injury." *Id.* 108 S.Ct. at 989. However, the Court went on to recognize that causal connection could be demonstrated in other ways such as in *Mills*, in which the material misrepresentations of the proxy statement, coupled with a showing that the proxy statement itself was an essential link in the transaction, sufficed. *Id.; accord Hershfang v. Knotter*, 562 F.Supp. 393, 398 (E.D.Va.1983), *aff'd*, 725 F.2d 675 (4th Cir.1984).

Mills left open the question of "whether causation could be shown where management controls a sufficient number of shares to approve the transaction without any votes from the minority." *Mills*, 396 U.S. at 385 n. 7, 90 S.Ct.

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[1] It is conceded that the proxy statement was, under Virginia law, an essential link for accomplishing the merger. Va.Code Ann. § 13.1-718(B)(1) (1989).

at 622 n.7. In *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir.1974), the combined votes of the minority shareholders could not have prevented the proposed merger. The Second Circuit, however, pointed to the remedial purpose of the Securities Act in holding that reliance is not a necessary element of causation even in such a situation; to do otherwise "would sanction all manner of fraud and overreaching in the fortuitous circumstance that a controlling shareholder exists." *Id.* at 383, quoting *Swanson v. American Consumer Industries, Inc.*, 415 F.2d 1326, 1331 (7th Cir.1969). We adopt the reasoning in *Schlick* and hold that reliance, even when the minority's voting strength is insufficient to halt a merger, is not an element of causation in a § 14(a) action. Thus, if the proxy statement contained material misrepresentations and was an essential link in the merger, § 14(a) liability may be established.[2]

IV. MATERIAL MISREPRESENTATIONS

To be actionable, a proxy solicitation must either contain false or misleading statements concerning a material fact or omit a material fact. *Alizac Partners v. Rospatch Corp.*, 712 F.Supp. 599, 604 (W.D.Mich.1989). Materiality is determined under an objective standard which contemplates

> a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

[2] Bankshares' proposed jury charge on "reliance materiality" read in pertinent part as follows:

> If Plaintiff proves that the alleged misstatements and omissions were made or omitted and that they are material as I have just defined that term, she may satisfy the necessary element of reliance if she proves that the proxy solicitation was an essential link in the accomplishment of the transaction.

We are unable to discern how this language differs from our holding on the reliance question.

TSC Industries, Inc. v. Northway, 426 U.S. 438, 449, 96 S.Ct. 2126, 2132, 48 L.Ed.2d 757 (1976). Bankshares and the Bank's directors dissect each alleged misrepresentation and omission in an attempt to show that the facts implicated by each were not material. While we appreciate the need to avoid setting too low a threshold of liability in such matters, we are persuaded that at least two of the allegations were sufficiently strong as to require that they be given to the jury to make that "delicate assessment of the inferences a 'reasonable shareholder' would draw" from the facts presented by Sandberg. *Id.*

The proxy statement contained a representation by the Bank's directors that they recommended approval of the merger because it offered the minority stockholders an opportunity to receive a high value for their shares. Sandberg attacked this as a material misrepresentation and alleged that the directors' real reason was a fear of replacement on the board. Va.Code Ann. § 13.1-718(B)(1) requires that the directors state their recommendation to the stockholders, and 12 C.F.R. § 355.212, Item 14(a), requires that the reasons for the merger be set forth. From the evidence at trial, the jury was certainly justified in believing that the directors did not believe a merger at $42 per share was in the minority stockholders' interest but, rather, that they voted as they did for other reasons, *e.g.*, retaining their seats on the board. Indeed, the entire thrust of Sandberg's case was that FABI orchestrated the merger from the outset and that the Bank's directors were considerably less concerned with the stockholders' interest than with their own. For instance, Sandberg adduced evidence that the directors failed to retain an independent investment

banker for an opinion on the value of the stock and instead accepted the $42 per share opinion of the firm retained by FABI. We cannot say that the directors' recommendation that the $42 offer was fair to the minority stockholders was, as a matter of law, not a material misrepresentation. *Cf. Denison Mines, Ltd. v. Fibreboard Corp.*, 388 F.Supp. 812, 821 (D.Del.1974) (in recognition of the impact of a reference to an investment advisor's opinion on a substantial number of stockholders, it was held that it was materially misleading as a matter of law to omit the basis for the advisor's opinion).

The proxy statement also stated that FABI had hired KBW "to pass on the fairness of the merger from a financial point of view," although whether KBW's opinion focused on fairness to Bankshares or to the minority stockholders is disputed. It is admitted that KBW relied only on the market price to set a value on the stock, and Sandberg's expert witness was able to show that the actual value was considerably higher (see Part VI, *infra*). Also, the independence of KBW was brought into question. For example, Beddow had opined to KBW that $42 was considered by FABI to be a fair price; coupled with the fee agreement by which KBW would receive $75,000 upon completion of the merger (in addition to the initial $25,000 payment), a substantial incentive to satisfy FABI was clearly present. That KBW's $42 valuation was something less than the product of a completely independent analysis was a question of fact. The representation in the proxy statement that it was such an independent determination could certainly have been found to be a material misrepresentation.[3] We hold,

[3] The other four allegations of material misrepresentations/omissions in the proxy statement were these: (1) failure to disclose that VBI, by virtue of its 85% holdings, had the voting power to elect members of the Bank's board; (2) statement that the recommended price per share was the result of negotiations; (3) failure to disclose financial information, including the value of the Bank's real estate holdings, which would show a value per share in excess of $42; and (4) failure to disclose that Beddow was also an officer of FABI.

therefore, that it was not error for the court to submit the issue of materiality to the jury.

Even assuming that some of the alleged misrepresentations were correctly submitted to the jury, the defendants contend that it is reversible error to have submitted any alleged misrepresentations which were not material as a matter of law. Contrary to defendants' argument, however, the submission of both correct and incorrect factual bases supporting a single theory of recovery is not grounds for reversal of a judgment on a general verdict. The cases cited by the defendants to the contrary involve the submission of both incorrect and correct legal theories of recovery. Compare *Gill v. Rollins Protective Services Co.*, 722 F.2d 55, 59 (4th Cir. 1983) (general verdict set aside when one of two legal theories erroneously submitted to the jury), with *Baumler v. State Farm Mutual Automobile Insurance*, 493 F.2d 130, 134 (9th Cir.1974) (general verdict upheld if sufficient evidence to support one of two actual theories of recovery on a single cause of action). We will not reverse on the ground that some of the allegations may have been immaterial as a matter of law.

As an alternative ground upon which to uphold the verdict despite the possibly incorrect submission of some alleged material misrepresentations to the jury, Sandberg points to the failure of the defendants to object to the following proposed jury instruction:

> The defendants either deny that these [the six alleged misrepresentations/omissions] were not disclosed or say that even if they weren't, they were not material omissions or misrepresentations. In order to establish then the first essential element under her Federal Securities Act claim, Count I, Ms. Sandberg must prove by a preponderance of the evi-

> dence first that the defendants made *one or more* of the misrepresentations of the fact as alleged or omitted to state facts which would be necessary to make other statements by the defendants not misleading to the plaintiff.

(Emphasis added.) The defendants' failure to object precludes them from assigning as error the giving of this instruction. Fed.R.Civ.P. 51. The failure to object provides an independent ground to reject defendants' argument. *Ramsey Products Corp. v. Morbark Industries, Inc.*, 823 F.2d 798, 804 (4th Cir.1987).

V. STATE LAW CLAIMS

Count II of the *Sandberg* suit was based on alleged violations of Va.Code Ann. § 13.1-690 (1989), which requires each corporate director to act "in accordance with his good faith business judgment of the best interests of the corporation." This statute also permits a director to rely on certain reports, information or opinions which he "believes, in good faith, to be reliable and competent." *Id.* Sandberg's state law claims were based on the directors' alleged failure to make a good faith effort to inform themselves as to the fairness of the merger proposal or to negotiate with Bankshares to obtain a higher price per share of the Bank stock. We reject the directors' argument that the evidence failed to show their lack of good faith.

The directors contend that evidence of "bad faith" was lacking because three directors who testified during the *Sandberg* trial all stated that, in their opinion, the $42 per share price was fair to the minority stockholders. They further contend that their reliance on the investment consultant retained by Bankshares and on the executive committee's recommendation to accept the $42 figure was justified under the statutory standard, as was their decision not to seek a second, independent opinion. These arguments are unavailing. The case against

the directors is that they merely rubberstamped everything placed before them by Bankshares. The evidence fully supports a view that the directors exercised no independent judgment whatsoever with regard to the interests of the minority stockholders and consequently, was sufficient to support the jury's finding of lack of good faith.

VI. DAMAGES

The jury in *Sandberg* awarded her an additional $18 per share over the $42 per share value of her stock resulting from the merger. The judgment in Count I (federal securities law violations) was entered against all defendants jointly and severally. Judgment on Count II (state law breach of fiduciary duty claims) was entered against the directors as an "alternative judgment;" the jury found for the corporate defendants on this count. Bankshares and the directors contend that the damage verdict cannot stand because it was based on impermissibly speculative evidence. Moreover, the directors contend that Sandberg's expert totally disregarded the market price of the Bank stock and that Virginia law governing the stock evaluation under Count II required that evidence on damages give some consideration to market price. The directors further attack the expert's equal valuation of both minority-held and majority-held stock. We turn first to Sandberg's evidence.

The verdict that Sandberg's stock was worth $60 at the time of the merger clearly evinces acceptance by the jury of the testimony of her expert witness. Sandberg's expert testified that he used two methods to evaluate Sandberg's stock. First, the dividend discount method yielded a value based on the company's projected ability to pay future dividends. Second, the stock prices of comparable banking organizations in and near Virginia were analyzed in terms of price/earnings and price/book multiples. Each of these methods yielded a value of approximately $60 per share. Since the market for the shares

was very inactive and the market price was inconsistent with that of comparable companies, the expert testified that he was not able to use market value to evaluate the stock. He also explained that the existence of an 85% majority shareholder acted to dampen trading activity due to uncertainty about the majority shareholder's intentions. There is no argument that the expert's opinion was based on anything other than information reasonably relied upon by experts in the particular field, and this is all that Fed.R.Evid. 703 requires.

The directors cite *Lucas v. Pembroke Water Co.*, 205 Va. 84, 135 S.E.2d 147, 150 (1964), for the proposition that Virginia law requires consideration of the market price in any determination of damages measured by the value of stock. *Pembroke Water*, however, involved a statutory procedure by which a court could appoint appraisers to fix a stock's value. In that case, the state appellate court held that the lower court was required to, and in fact did, consider the four necessary elements to arrive at the "fair value" of the stock: market value, net asset value, investment value, and earning capacity. *Id.* That a court, as the fact finder in an equitable proceeding, is required to consider each element does not mean that a plaintiff seeking to show a stock's value in an action at law must similarly employ each valuation method. In any event, even if the defendants are correct that market value must be considered, the requirement was satisfied. Sandberg's expert did consider the market value but determined that it was not a reliable indicator of the stock's inherent value. *See Atlantic States Const., Inc. v. Beavers*, 169 Ga.App. 584, 314 S.E.2d 245, 249 (1984) ("flexible approach" in determination of fair value adopted for statutory appraisal proceeding). It was not error to deny defendants' motions for directed verdict.

The defendants proposed a jury instruction to the effect that the jury could take into account that minority

shares ordinarily do not have the same value as shares held by a majority shareholder. As a legal basis for this instruction, the directors cited *Glass v. Glass*, 228 Va. 39, 321 S.E.2d 69, 76 (1984). That the jury was not instructed that the value of a minority interest is often discounted does not in and of itself justify reversal of the *Sandberg* judgment. It is sufficient that the defendants' expert was not prohibited from testifying regarding his finding of a lower value based in part on discounting due to the minority status of Sandberg's stock. The defendants cite to nothing in the record to support a finding that the minority's holdings should be discounted or, if so, how much. In view of this lack of evidence, we think that the lower court properly refused to instruct the jury on discounting the value of minority-held shares.

VII. OFFENSIVE COLLATERAL ESTOPPEL

After entry of the *Sandberg* judgment, the *Weinstein II* plaintiffs moved for summary judgment on the ground that collateral estoppel barred relitigation of the issues decided in *Sandberg*. The lower court granted the motion and entered judgment on the basis of an additional $18 for each share held by the *Weinstein II* plaintiffs. Bankshares contends that the lower court erred, but we disagree and hold that the doctrine of offensive collateral estoppel was properly applied in this case.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), also arose out of a stockholder action involving an allegedly false and misleading proxy statement. In another action, the Securities and Exchange Commission had obtained a declaratory judgment against the company and its directors that the same proxy statement was materially false and misleading in essentially the same respects as alleged in the shareholders' suit. The shareholder plaintiffs then moved for partial summary judgment on the ground that the

company and directors were collaterally estopped from relitigating the same factual issues which had been decided adversely to them in the SEC action. The motion was granted, and the Supreme Court sanctioned this use of offensive collateral estoppel.

In *Parklane Hosiery*, the Supreme Court established as a general rule that offensive collateral estoppel should not be used when the plaintiff invoking the doctrine could easily have joined the defendant in the earlier action or if it would be unfair to the defendant for other reasons. Possible reasons for unfairness might be that the earlier suit was of such small value that it provided little incentive for a vigorous defense, or that the defendant has procedural advantages in the later action that were unavailable in the earlier suit and which might cause a different result. The Court cautioned that its use should be subject to the broad discretion of the district court. *Id.* at 331, 99 S.Ct. at 651-52. We find that this discretion was properly exercised by the lower court. None of these exceptions are presented by the *Sandberg* and *Weinstein II* cases.

It was the defendants who opposed expansion of *Sandberg* by addition of the *Weinstein I* group or of the entire minority shareholder class. Moreover, the stakes were evident from the outset in *Sandberg*, and the defendants do not complain now that they had insufficient incentive to vigorously defend. If the *Sandberg* judgment stands, as we have decided it should, then *Parklane Hosiery* clearly sanctions the summary judgment in *Weinstein II*.

VIII. LIABILITY CAPS

In its *Weinstein II* judgment, the court imposed caps on the liability of each of the defendant Bank directors under the judgment on the state-law claims. This effectively reduced the plaintiffs' "alternative" judgment on the state-

law count by $965,682.66.[4] The authority for the imposition of the caps is Va.Code Ann. § 13.1-692.1 (1985) which provides in pertinent part as follows:

> A. In any proceeding brought by or in the right of a corporation or brought by or on behalf of shareholders of the corporation, the damages assessed against an officer or director arising out of a single transaction, occurrence or course of conduct shall not exceed . . .
>
> 2. The greater of (i) $100,000 or (ii) the amount of cash compensation received by the officer or director from the corporation during the twelve months immediately preceding the act or omission for which liability was imposed.

Judgment on Court II was limited to $100,000 against each of eighteen individual directors and to the annual salaries of two others. The plaintiffs contend that the statute under which the caps were imposed deprives them of their constitutional rights to trial by jury, due process, and equal protection.

In *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir.1989), this Court addressed the constitutionality of a Virginia statute which placed a cap on medical malpractice liability. On the basis of the reasoning of the Supreme Court of Virginia's opinion in *Etheridge v. Medical Center Hospitals, Inc.*, 237 Va. 87, 376 S.E.2d 525 (1989), we held that the statutory cap in Va.Code Ann. § 8.01-581.15 (1984) did not violate the plaintiffs' Seventh Amendment right to a trial by jury. We see no basis for distinguishing the malpractice cap from the one applied to the Bank directors' liability on the state cause of action. *See also Franklin v. Mazda Motor Corp.*, 704 F.Supp. 1325 (D.Md.1989) (Seventh Amendment challenge to Maryland malpractice cap

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[4] The judgment on Count II in *Weinstein II* is $3,292,236, whereas the caps act to limit the total liability on Count II to only $2,346,553.34.

rejected). Because they were not raised below, we do not reach the equal protection and due process challenges to the statute. *United States v. One 1971 Mercedes Benz 2-Door Coupe*, 542 F.2d 912, 915 (4th Cir.1976).

IX. RES JUDICATA EFFECT OF *WEINSTEIN I*

As previously noted, the sixteen *Weinstein I* petitioners sought damages for breach of fiduciary duties in the state courts, and the appeal of the dismissal of their action was pending when the *Weinstein II* judgment was entered. The directors contend that the doctrine of *res judicata* precludes the state law claims in *Weinstein II*. The district court rejected this argument, and we do likewise.

In a letter opinion outlining the basis for the dismissal of the *Weinstein I* complaint, the Virginia Circuit Court judge explained that Va.Code Ann. § 6.1-43 (1989) specifically and clearly exempted holders of bank stock from the statutory appraisal remedy provided for in Va.Code Ann. § 13.1-730 (1989). Rejecting the *Weinstein I* plaintiffs' argument that a common law right of appraisal existed despite the statutory exclusion, the circuit court judge noted that an action at law for damages might nevertheless be available for breach of fiduciary duty or fraud. The judge added, however, that the amended complaint did not allege facts sufficient to support such claims.

In their brief to this Court, the directors concede that the *Weinstein I* plaintiffs could have transferred their damage claim to the law side of the state court. They contend, however, that the *res judicata* bar arose when the order dismissing their state court action was appealed rather than transferred and, therefore, that the district court erred in denying the defendants' motion for a directed verdict on Count II in *Weinstein II*. An analysis of the Virginia case law on point leads us to a different conclusion.

In *Flora, Flora & Montague, Inc. v. Saunders*, 235 Va. 306, 367 S.E.2d 493 (1988), the Supreme Court of Virginia reiterated its rule against claim-splitting in the context of two cases brought on the chancery side of court involving the same contract. This case is inapposite to the *Weinstein* cases, however. As previously noted, the *Weinstein I* plaintiffs could have transferred their damage action to the law side of the state court. Moreover, it is clear that the § 14(b) action could only have been filed in federal court. 15 U.S.C. § 78aa (1989 Supp.). Thus, we are unconvinced that the consolidation of the federal and state claims in a single federal suit violates the policy against claim-splitting; in fact, such a single filing would appear to promote the policy. We note that the Virginia courts have repeatedly held that Va. Code § 8.01-270 is a remedial statute designed to save costs and prevent delay. *See, e.g., Thomas v. Lauterbach*, 205 Va. 176, 135 S.E.2d 781 (1964). The directors argue that the decision to appeal from the order dismissing the action, rather than moving to transfer the breach of fiduciary claim to the law side of the court, forecloses the sixteen *Weinstein I* plaintiffs from pursuing their state-law claims in the federal action. This strikes us as precisely the sort of technical result that the Virginia courts have sough to prohibit. The directors' *res judicata* argument is rejected.[5]

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[5] The directors make two additional arguments: (1) Virginia's one-year statute of limitations bars the state law claims in *Sandberg*, and (2) the *Sandberg* verdicts are irreconcilably inconsistent. As to the first argument, Sandberg's state law cause of action accrued on the date of the merger itself, this being the date on which she was injured by the conversion of her stock to a right to receive $42 per share. The merger was consummated on May 27 1987, and *Sandberg* filed her action on March 1988. As to the second argument, the verdicts arose from claims consisting of different elements, and the exoneration of Bankshares on the state law claims may have been due to the jury's belief that the relationship between Bankshares and the minority stockholders was too tenuous for liability to attach. Neither argument presents grounds for reversal.

X. ATTORNEYS' FEES

In *Sandberg* and *Weinstein II*, the prevailing parties moved for awards of attorneys' fees against FABI and VBI. The lower court in each case denied such fees on the grounds that the benefit of the judgments flowed only to the plaintiffs in each case and not to the corporate defendants. The court acknowledged the deterrent effect of such fees, but concluded that the judgments increasing the price for each minority-held share by $18 acted as an adequate deterrent.

In *Mills v. Electric Auto-Lite Company*, 396 U.S. 375, 390, 90 S.Ct. 616, 624-25, 24 L.Ed.2d 593 (1970), the Supreme Court held that the absence of express statutory authorization is not a bar to a fee award in § 14(a) stockholder actions, and under "special circumstances" such fees should be recoverable. We express no opinion as to whether such "special circumstances" exist in *Sandberg*; however, in view of the transformation of *Sandberg* into a class action, the order denying the motion for an award of attorneys' fees is vacated and the matter remanded for reconsideration. We find no abuse of discretion in the denial of fees in *Weinstein II*, and, accordingly, that order is affirmed.

XI. SUMMARY

The judgment in *Sandberg* is affirmed and the case is remanded with directions to enter an order certifying a class of all non-defendant minority stockholders except those who were plaintiffs in *Weinstein II*. The order denying attorneys' fees in *Sandberg* is vacated and remanded for reconsideration in light of the class certification ruling. The judgment in *Weinstein II* is affirmed, as is the order denying attorneys' fees.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Case Number: C/A88-299-A

DORIS I. SANDBERG

v.

VIRGINIA BANKSHARES, INC., *et al*

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in favor of the plaintiff, Doris I. Sandberg, against the defendants Virginia Bankshares, Inc., First American Bankshares, Inc., Emanuel A. Baker, Jr., Jack W. Beddow, Harriet F. Bradley, Joel T. Broyhill, Thomas B. Chamberlin, Thomas P. Chisman, Sidney O. Dewberry, Milton L. Drewer, Jr., Eric W. Erdossy, George W. Johnson, Charles T. Lindsay, Jr., Donald R. Maxfield, Linda H. Michael, Milton V. Peterson, E. Guy Ridgely, Glenn W. Saunders, Charles H. Smith, Jr., Verlin W. Smith, Henry A. Thomas, and Stephen G. Yeonas, jointly and severally, in the amount of $43,956.00 in accordance with the verdict of the jury.

Date: September 29, 1988

DORIS R. CASEY
Clerk

/s/ _____
(By) Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 88-1020-A

PAUL H. WEINSTEIN, *et al.*,
Plaintiffs,

v.

FIRST AMERICAN BANKSHARES, INC., *et al.*,
Defendants.

ORDER

For the reasons stated from the bench on November 4, 1988, it is hereby ORDERED that:

1. The motion of the plaintiffs for summary judgment is GRANTED in the following respects:

2. Judgment is hereby entered on Count I in favor of the plaintiffs against the defendants jointly and severally, in the total amount of $3,292,236, representing $18 per share held by each plaintiff, as itemized in Exhibit A attached hereto.

3. Alternatively, judgment is hereby entered on Count II in favor of the plaintiffs against the defendants Emanuel A. Baker, Jr., Jack W. Beddow, Harriet P. Bradley, Joel T. Broyhill, Thomas B. Chamberlin, Thomas P. Chisman, Sidney O. Dewberry, Milton L. Drewer, Jr., Eric W. Erdossy, George W. Johnson, Charles T. Lindsay, Jr., Donald R. Maxfield, Linda H. Michael, Milton V. Peterson, E. Guy Ridgley, Glenn W. Saunders, Charles H. Smith, Jr., Verlin W. Smith, Henry A. Thomas, and

Stephen G. Yeonas, jointly and severally, in the amount of $18 per share held by each plaintiff as itemized in Exhibit A, attached hereto; provided, however, that as to Count II the individual liability of defendants Emanuel A. Baker, Jr., Jack W. Beddow, Harriet P. Bradley, Joel T. Broyhill, Thomas B. Chamberlin, Thomas P. Chisman, Sidney O. Dewberry, George W. Johnson, Charles T. Lindsay, Jr., Donald R. Maxfield, Linda H. Michael, Milton V. Peterson, E. Guy Ridgley, Glenn W. Saunders, Charles H. Smith, Jr., Verlin W. Smith, Henry A. Thomas, and Stephen G. Yeonas shall not exceed $100,000, that the liability of defendant Milton L. Drewer, Jr. shall not exceed $390,329.00, and that the liability of defendant Eric W. Erdossy shall not exceed $156,224.34.

4. The motion of the plaintiffs to dismiss Count II without prejudice as against First American Bankshares, Inc. and Virginia Bankshares, Inc., is GRANTED.

5. The motion of the defendants to strike the plaintiffs' prayer for punitive damages is GRANTED.

/s/ G. V. B. J.
United States District Judge

DATED: November 15th, 1988

AGREED AS TO FORM:

HOGAN & HARTSON

By /s/ David G. Leitch
JOSEPH M. HASSETT
JOHN C. KEENEY, JR.
GEORGE H. MERNICK, III
DAVID G. LEITCH
Attorneys for Plaintiffs

HUNTON & WILLIAMS

By /s/ Thomas J. Cawley [Illegible]
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Attorneys for Defendants
First American Bankshares, Inc. and
Virginia Bankshares, Inc.

MCGUIRE, WOODS, BATTLE & BOOTHE

By /s/ John S. Stump [Illegible]
JOHN S. STUMP
SEAN F. MURPHY
ROBERT R. VIETH
Attorneys for Director Defendants

APPENDIX D

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030

County of Fairfax City of Fairfax City of Falls Church

October 6, 1987

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Re: *Weinstein, et al v. First American Bank of Virginia, et al*
Chancery No. 101443

Dear Counsel:

This matter is before the Court on Defendants' Demurrer to Count III of the Amended Bill of Complaint. In Count III, Complainants allege that Defendants breached their fiduciary duty to treat the minority stockholders fairly in selecting the price to be paid for stockholder shares following a freeze-out cash-out merger. After consideration of the oral arguments and memoranda of law, the Defendants' Demurrer is sustained.

Complainants contend that Defendants have a duty to pay fair value for the stock and that Complainants may resort to a court of equity for enforcement. Both parties acknowledge that Va. Code § 6.1-43 exempts holders of bank shares from the statutory appraisal rights found in Va. Code § 13.1-730. However, Complainants argue that there remains a common law counterpart to statutory appraisal not affected by § 6.1-43. With this, I disagree.

Historically, the appraisal right, a statutory creation, was designed to protect dissenters' interests when legislation was enacted to permit mergers without unanimous consent. Statutory appraisal is now considered the exclusive remedy for stockholders opposing a merger. *See Adams v. United States Distributing Corp.*, 184 Va. 134, 34 S.E.2d 244 (1945), *cert. denied*, 327 U.S. 788 (1946). However, dissenting stockholders in bank mergers do not even have this solitary remedy available to them. Va. Code § 6.1-43 specifically excludes bank mergers from application of § 13.1-730. While the result may seem harsh, this is how the General Assembly chose to balance the competing interests of minority stockholders versus those of the depositing public. Investors who opt to purchase stock in a bank do so with the knowledge that § 13.1-730 is not available to them in the event of a freeze-out. *See The Pittston Co. v. O'Hara*, 191 Va. 886, 63 S.E.2d 34 (1951); *Adams*, 184 Va. at 149, 34 S.E.2d at 251 (well-established that State's corporation law is part of contract between corporation and its stockholders).

The absence of a statutory appraisal remedy is not to be construed as a license to bank directors to set unfair prices. Complainants may have an action at law for damages if they can show that a breach of fiduciary duty or fraud prompted the Board to recommend an inadequate price for the shares. In the present case, however, complainants have not alleged facts sufficient to support either of these claims.

The General Assembly has seen fit to deny the appraisal remedy to dissenters in a bank merger. Complainants

may not obtain that which the legislature has taken away by masking their request as the enforcement of an equitable duty.

Mr. Cawley will prepare an order reflecting this decision and submit it to opposing counsel for endorsement.

Very truly yours,

/s/ Johanna L. Fitzpatrick
JOHANNA L. FITZPATRICK

JLF/11r

APPENDIX E

FIRST AMERICAN BANK OF VIRGINIA
1970 Chain Bridge Road
McLean, Virginia 22102

NOTICE OF ANNUAL MEETING
OF SHAREHOLDERS

April 21, 1987

To All Shareholders of First American Bank of Virginia

FIRST AMERICAN BANK OF VIRGINIA
1970 Chain Bridge Road
McLean, Virginia 22102

NOTICE OF ANNUAL MEETING OF SHAREHOLDERS

April 21, 1987

To All Shareholders of First American Bank of Virginia

Notice is hereby given that the Annual Meeting of Shareholders of First American Bank of Virginia will be held on Tuesday, April 21, 1987, at 2:00 p.m., at the office of First American Bank of Virginia, 1970 Chain Bridge Road, McLean, Virginia, for the following purposes:

1. To elect the directors of the First American Bank of Virginia to serve until the next annual meeting or until their successors may be elected.
2. To consider and vote upon an Agreement and Plan of Merger dated February 12, 1987 among Virginia Bankshares, Inc., FAB Acquisition Bank, a wholly owned subsidiary of Virginia Bankshares, Inc., and First American Bank of Virginia pursuant to which (a) FAB Acquisition Bank will be merged into First American Bank of Virginia and (b) each holder of common stock of First American Bank of Virginia, other than Virginia Bankshares, Inc., will be entitled to receive $42 cash, without interest, for each share held.

Only shareholders of record at the close of business on March 6, 1987 are entitled to notice of and to vote at the Annual Meeting and any adjourning thereof. Shareholders of First American Bank of Virginia are not entitled to assert dissenters' rights in connection with the merger.

/s/ Milton L. Drewer, Jr.
MILTON L. DREWER, JR.
Chairman of the Board and
Chief Executive Officer

Anticipated Mailing Date:
March 25, 1987

We hope you can attend this meeting in person. We urge you to mark, date, sign and return the enclosed Proxy in the enclosed postage-paid envelope, promptly, whether or not you plan to attend the meeting in person. Execution of the Proxy will not in any way affect your right to attend the meeting and vote in person if you wish to do so. Any shareholder giving a Proxy has the right to revoke it anytime before it is exercised, if he wishes, by submitting a written request for such revocation to the Secretary of First American Bank of Virginia.

SUMMARY

The following is a summary of certain information contained elsewhere in this Proxy Statement. For a more complete statement, reference is made to, and this summary is qualified in its entirety by, the more detailed information contained in the Proxy Statement, the appendices hereto and the documents referred to herein.

First American Bank of Virginia and Virginia Bankshares, Inc.

First American Bank of Virginia (hereinafter "the Bank") is a commercial bank chartered in Virginia with 101 full service banking offices located throughout the Commonwealth. On December 31, 1986, the Bank reported total assets of $2,849,847,000. See "Business of the Bank."

Virginia Bankshares, Inc. (hereinafter "Virginia Bankshares") is a registered bank holding company and a wholly-owned subsidiary of First American Bankshares, Inc. (hereinafter FABI"), also a registered bank holding company. Virginia Bankshares owns 85% of the issued and outstanding common stock of the Bank. See "Principal Holder of Voting Securities."

Election of Directors

At the Annual Meeting, the Bank's shareholders will be asked to elect directors of the Bank to serve until the next annual meeting or until their successors may be elected.

Merger with FAB Acquisition Bank

At the annual meeting, the Bank's shareholders will also be asked to approve the Plan of Merger that provides for the merger (the "Merger") of FAB Acquisition Bank, a wholly-owned subsidiary of Virginia Bankshares, with and into the Bank under the Bank's Restated Articles of Incorporation. The Plan of Merger provides for a cash payment to the Bank's shareholders, other than Virginia Bankshares, of $42 for each share of the Bank's common stock that they hold. See "The Proposed Merger."

Shareholder Approval

Pursuant to the Virginia Stock Corporation Act, the affirmative vote of the holders of more than two-thirds (66⅔%) of the votes entitled to be cast by the Bank's common stock will be required to approve the Plan of Merger. Virginia Bankshares, as holder of all of the outstanding shares of FAB Acquisition Bank, has approved the Plan of Merger. Because Virginia Bankshares owns 85% of the Bank's issued and outstanding common stock, and has indicated its intention of voting its shares for approval of the Plan of Merger, the Bank's Board of Directors expects the Plan of Merger to be approved. See "Outstanding Shares and Voting Rights."

Recommendation of the Board of Directors

The Bank's Board of Directors has approved the Plan of Merger and believes that the terms of the Merger are fair to its shareholders and that the proposed Merger is in the best interest of shareholders of the Bank. Ac-

cordingly, the Board recommends that shareholders vote for the proposed Merger. The Board of Directors believes that the proposed Merger will enable the Resulting Bank to compete more effectively, provide the opportunity to realize certain economics, and result in an institution better able to respond to technological change. The Board believes that the price to be paid to shareholders other than Virginia Bankshares is fair. The Board of Directors is aware that the recent trend in formation of bank holding companies is for subsidiary banks to be wholly-owned subsidiaries rather than to have an outstanding minority interest. See "The Proposed Merger—Background of the Merger."

Opinion of Investment Banker

FABI's Board of Directors commisisoned Keefe, Bruyette & Woods, Inc., an independent investment banking firm, to pass on the fairness of the Merger from a financial point of view. This opinion, which is included in the Proxy Statement as *Appendix III*, should be read in its entirety. See "The Proposed Merger—Opinion of Financial Adviser."

Management of the Resulting Bank

After the Effective Date of the Merger, the Board of Directors of the Resulting Bank will consist of the members of the Board of Directors of the Bank immediately preceding the Effective Date of the Merger. Similarly, the principal executive officers of the Resulting Bank will consist of the principal officers of the Bank immediately preceding the Effective Date of the Merger. See "Management of Resulting Bank."

Dissenters' Rights

Under the Virginia Banking Act, holders of the Bank's common stock will not be entitled to statutory dissenters' rights with respect to the Merger. See "Rights of Dissenting Shareholders."

Federal Income Tax Consequences

Generally, if the Merger is consummated, each shareholder other than Virginia Bankshares will recognize taxable gain or loss for federal income tax purposes equal to the difference, if any, between the amount of cash received pursuant to the Merger and the cost or other tax basis of the shareholder's Bank common stock. Each shareholder should consult his tax adviser as to the particular consequences of the Merger to him, including the application of state, local and foreign tax laws. See "The Merger—Federal Income Tax Consequences."

Recent Market Prices, Dividends

The Bank's common stock is traded in the over-the-counter market. The following table sets forth for the period indicated the prices per share and the amount of cash dividends per share by quarters for 1987 (to date), 1986 and 1985.

	1987		
Two Months Ending	Sales *		Dividends Per Share
	High	Low	
February 28	$39	$32	$.30 per quarter

	1986		
Quarter Ended	Sales *		
	High	Low	
March 31	$31	$31	$.30 per quarter
June 30	32	32	
September 30	32	32	
December 31	32	32	

	1985				
Quarter Ended	Bid/Sales *		Asked		
	High	Low	High	Low	
March 31	$30	$30	$33	$33	$.30 per quarter
June 30	30	30	N/A	N/A	
September 30	30	30	N/A	N/A	
December 31	30	31	N/A	N/A	

* NASDAQ revised its method of reporting stock prices on April 1, 1985 to report only high and low sales prices.

Selected Financial Data

The following table sets forth certain historical consolidated financial information for the Bank. This information is based on the financial statements of the Bank included in this Proxy Statement and should be read in conjunction therewith. The data have been adjusted for stock splits and stock dividends during the indicated period.

FIRST AMERICAN BANK OF VIRGINIA

YEAR ENDED DECEMBER 31
(IN THOUSANDS, EXCEPT PER SHARE AMOUNTS)

SUMMARY OF OPERATIONS	1986	1985	1984	1983	1982
INTEREST INCOME	$ 222,327	$ 211,101	$ 195,864	$ 148.879	$ 139,473
INTEREST EXPENSE	118,865	119,019	114,051	82,078	81,711
NET INTEREST INCOME	103,462	92,082	81,813	66,801	57,762
PROVISION FOR LOAN LOSSES	6,000	5,400	2,750	2,032	1,333
NET INTEREST INCOME AFTER PROVISION FOR LOAN LOSSES	97,462	86,682	79,063	64,769	36,429
NON-INTEREST INCOME	32,278	24,463	20,395	15,186	10,582
NON-INTEREST EXPENSE	94,224	82,736	77,460	55,798	49,753
INCOME BEFORE APPLICABLE INCOME TAXES	35,516	28,409	21,998	24,157	17,658
APPLICABLE INCOME TAXES	10,749	7,219	4,635	6,950	3,737
NET INCOME	$ 24,767	$ 21,190	$ 17,363	$ 17,207	$ 13,921
PER SHARE:					
NET INCOME	$ 5.10	$ 4.48	$ 3.67	$ 3.64	$ 2.95
CASH DIVIDENDS PAID	1.20	1.20	1.20	1.13	0.95
RETURN ON ASSETS	0.98%	0.98%	0.93%	1.16%	1.11%
RETURN ON EQUITY	16.45%	16.39%	15.01%	15.63%	14.35%
AVERAGE COMMON SHARES OUTSTANDING	4,859,744	4,727,449	4,727,449	4,727,449	4,715,993

SUMMARY OF OPERATIONS—Continued	1986	1985	1984	1983	1982
BALANCE SHEET DATA			AT YEAR END		
ASSETS	$ 2,849.8	$ 2,377.5	$ 2,000.7	$ 1,817.0	$ 1,349.6
DEPOSITS	2,465.4	2,062.6	1,749.3	1,584.4	1,153.4
LOANS (NET)	1,835.2	1,557.2	1,289.4	919.0	754.2
SECURITIES	375.1	353.4	360.9	428.0	265.4
SHAREHOLDERS' EQUITY	163.1	139.1	123.6	115.4	103.5
			AVERAGE BALANCE		
ASSETS	$ 2,533.1	$ 2,158.9	$ 1,864.9	$ 1,485.7	$ 1,258.1
DEPOSITS	2,193.7	1,882.4	1,622.7	1,279.8	1,056.4
LOANS (NET)	1,672.6	1,404.2	1,070.4	810.3	739.2
SECURITIES	387.0	350.1	388.7	342.8	240.3
SHAREHOLDERS' EQUITY	150.6	129.3	115.7	110.1	97.0

FIRST AMERICAN BANK OF VIRGINIA
1970 Chain Bridge Road
McLean, Virginia 22102

PROXY STATEMENT

Introduction

This statement is furnished in connection with the solicitation of proxies by the Board of Directors of First American Bank of Virginia ("the Bank") to be used in voting at the Annual Meeting of Shareholders of the Bank, to be held on Tuesday, April 21, 1987 at 2:00 p.m., at the office of the Bank at 1970 Chain Bridge Road, McLean, Virginia. The Bank will begin mailing this Proxy Statement to its shareholders on or about March 25, 1987.

At the Annual Meeting, shareholders will be asked to approve an Agreement and Plan of Merger dated February 12, 1987 (the "Plan of Merger") among the Bank, Virginia Bankshares, Inc. ("Virginia Bankshares") and FAB Acquisition Bank, a wholly-owned subsidiary of Virginia Bankshares, providing for the merger of FAB Acquisition Bank into the Bank and the conversion of each share of the Bank's common stock, other than shares held by Virginia Bankshares, into the right to receive $42 cash. The Resulting Bank will be the Bank, which will operate under the Bank's Articles of Incorporation under the name "First American Bank of Virginia." A copy of the Plan of Merger is attached to this Proxy Statement as *Appendix I.* In addition, shareholders will be asked to vote for directors to serve for the ensuing year.

Voting and Proxy Revocation Rights

Execution of a Proxy will not, in any way, affect a shareholder's right to attend the Annual Meeting and vote in person and any shareholder giving a Proxy has the right to revoke it at any time before it is exercised, if he wishes, by submitting a written request of such revocation

to the Secretary of the Bank. Attendance at the Meeting in and of itself will not constitute revocation of the Proxy.

Shares represented at the meeting by proxies given to the Board of Directors will be voted in the manner specified by the shareholders. If a Proxy is marked neither for nor against the Plan of Merger, shares represented by that Proxy will be voted in favor of the Plan of Merger.

Rights of Dissenting Stockholders

Under the provisions of the Virginia Banking Act, shareholders of a Virginia banking corporation are not granted the right to object to a merger and demand payment for their shares; thus holders of the Bank's common stock do not have statutory dissenters' rights with respect to the Merger.

Outstanding Shares and Voting Rights

The Bank has outstanding 4,896,287 shares of common capital stock and this is the only class of stock authorized for the Bank. Each shareholder, as of the close of business on the Record Date of Friday, March 6, 1987, is entitled to vote at the Annual Meeting one vote for each share of common stock held in his name on the records of the Bank at the close of business on the Record Date. Under the Articles of Incorporation and Bylaws of the Bank, cumulative voting is not permitted.

As of the Record Date the only person, firm or corporation of record, holding or known to the Bank to own beneficially 5% or more of the outstanding voting stock of the Bank was Virginia Bankshares, a bank holding company and a wholly-owned subsidiary of First American Bankshares, Inc. ("FABI") that, on the Record Date, held 4,162,052 shares representing 85% of the outstanding shares of the Bank. Virginia Bankshares has the sole investment and voting power in connection with such

stock. Because Virginia Bankshares owns 85% of the Bank's common stock, and has indicated its intention of voting for the Plan of Merger, the Bank expects the Plan of Merger to be approved and adopted as Virginia law requires the affirmative vote of more than two-thirds (66⅔%) of votes entitled to be cast by the holders of the Bank's common stock to approve the Merger. The address of both Virginia Bankshares and FABI is First American Bank Building, 15th & H Streets, N.W., Washington, D.C. 20005.

Election of Directors

The Articles of Incorporation and Bylaws of the Bank provide that the Board of Directors shall consist of not less than five (5) nor more than thirty-seven (37). The Board of Directors of the Bank has nominated twenty-one (21) persons, reserving the right, in accordance with the Code of Virginia, to increase the membership of the Board during the term but not to exceed the number set by the Bylaws.

The directors are to hold office until the next Annual Meeting of Shareholders in 1988 or until their successors have been duly elected and qualified. The experience and ability of the nominees make it unnecessary, in management's view, to elect the full number of directors authorized by the Articles of Incorporation and Bylaws. It is management's intention that proxies solicited shall be voted for the nominees set forth below unless directions are given to the contrary. In the event any nominee should unexpectedly become unavailable for election as a director, the proxies will be voted for such nominee or nominees, if any, as recommended by management in accordance with its best judgment. In no event will proxies solicited be voted for more than twenty-one (21) nominees.

Management has nominated for re-election all current directors eligible to serve.

Nominees for Directors

No Director owns as much as one percent (1%) of the stock of the Bank. Directors and principal officers of the Bank, as a group, beneficially own 58,249 shares (1.2%) of the Bank's common stock.

The following table sets out the nominees for directors and the shares they own beneficially in the Bank. For each nominee, the table lists additional information, including the nominee's year of birth, the length of service as a director, and a brief account of the nominee's business experience during the past five (5) years.

Name and Year of Birth	Served as Director (1)	Business Experience During Past Five Years and Directorships of Other Public Companies	Number of Shares of the Bank's Common Stock Beneficially Owned, Directly or Indirectly, as of 2/1/87
Emmanuel A. Baker, Jr. (1943)	1976	President, Town & Country Properties, Inc. and Town & Country Properties, Inc. of Maryland (Realtor).	1,506(2)
Jack W. Beddow (1921)	1981	Executive Vice President and Secretary, First American Bankshares, Inc.; Director, First American Bankshares, Inc., and First American Bank of Maryland.	210
Harriet F. Bradley (1921)	1973	Housewife.	286
Joel T. Broyhill (1919)	1965	Investor.	31,250(3)
Thomas B. Chamberlin (1926)	1971	Partner, DeLashmutt Associates (Engineers and Land Surveyors).	2,257(4)
Thomas P. Chisman (1921)	1984	Chairman of Board and Director of Harrogate's, Ltd.; Chairman of Board of TPC, Ltd.	104

Name and Year of Birth	Served as Director (1)	Business Experience During Past Five Years and Director-ships of Other Public Companies	Number of Shares of the Bank's Common Stock Beneficially Owned, Directly or Indirectly, as of 2/1/87
Sidney O. Dewberry (1927)	1965	Partner, Dewberry & Davis (Engineering, Architecture, Planning & Surveying).	2,871(5)
Milton L. Drewer, Jr. (1923)	1966	Chairman of the Board of Chief Executive Officer of First American Bank of Virginia; Director, Virginia Electric Power Company; Director, First American Bank of Maryland; Director, First American Bank, N.A., Washington; President and Chairman of the Board of First American Metro Corp.	5,835(6)
Eric W. Erdossy (1940)	1986	President and Chief Administrative Officer of First American Bank of Virginia.	587(7)
George W. Johnson (1928)	1986	President, George Mason University.	100
Charles T. Lindsay, Jr. (1935)	1973	President, Lindsay Cadillac Company.	350

Donald R. Maxfield (1931)	1973	President, D. R. Maxfield & Company (Certified Public Accountants).	1,038
Thomas G. Mays (1924)	1971	Attorney, Thomas G. Mays, P.C.; formerly Partner with McDermott, Will & Emery, prior to 1983.	526
Linda H. Michael (1936)	1977	Vice President and Treasurer, Michael & Michael, Inc. (Architects).	550
Milton V. Peterson (1936)	1971	President, Milton V. Peterson Investment Company; President, Hazel/Peterson Companies (Land Development).	2,050
Glen W. Saunders, Jr. (1927)	1969	President, International Real Estate Associates, Ltd.	1,442
Dwight C. Schar (1942)	1986	President, NV Homes, Inc.	100
Charles H. Smith, Jr. (1921)	1962	President, Enfield Investment Corporation; Chairman of the Board of Directors of First Federal Savings & Loan Association of Northern Virginia.	700
Verlin W. Smith (1917)	1973	President, Farms & Acreage Inc. (Realtors).	485

Name and Year of Birth	Served as Director (1)	Business Experience During Past Five Years and Director-ships of Other Public Companies	Number of Shares of the Bank's Common Stock Beneficially Owned, Directly or Indirectly, as of 2/1/87
Henry A. Thomas (1934)	1963	Of Counsel, Thomas and Fiske, P.C.: Director, Providence Savings & Loan Association; Director, Real Title Company, Inc.; Commissioner of Accounts, Circuit Court, City of Alexandria, Virginia.	602
Stephen G. Yeonas (1925)	1962	President, Stephen G. Yeonas Company (Builders and Developers); Director, Washington Gas Light Company; Director of Washington Mutual Investors Fund.	5,400(8)

The Bank has had, and expects to have in the future, banking transactions in the ordinary course of its business with directors, officers, principal shareholders, and their associates, on the same terms, including interest rates and collateral on loans, as those prevailing at the same time for comparable transactions with others, and which do not involve more than the normal risk of collectability or present other unfavorable features.

First American Corporation, the parent holding company of FABI, has pledged all of the outstanding stock of FABI to secure a loan of $50,000,000 made to First American Corporation by Banque Arabe et Internationale d'Investissement, 12 Place Vendome, 75001 Paris, France, as agent for a group of banks, to fund in part First American Corporation's acquisition of FABI's stock. It is possible, in the event of default on the loan, that the lenders could foreclose upon the collateral, thus changing the ownership of the stock and effectively bringing about a change of control of FABI.

Credit and Commerce American Investment, B.V., a Netherlands Corporation ("CCAI"), 131-135 De Lairessestraat, Amsterdam, Netherlands, owns all of the stock of First American Corporation (formerly "FBG Holding Corporation"), and the stock of CCAI is, in turn, wholly owned by Credit and Commerce American Holdings, N.V., a Netherlands Antilles Corporation ("CCAH"), 6 Pietermaai, Willemstaad, Curacao, Netherlands Antilles.

According to the most recent filing with the Federal Deposit Insurance Corporation, namely an acquisition statement under Section 13(d) of the Securities Exchange Act of 1934, the name, address, principal occupation and citizenship of the largest shareholder of CCAH is Kamal Adham, P.O. Box 1150, Jeddah, Saudi Arabia, a citizen of Saudi Arabia, who is engaged in international trading activities through International Commercial and Industrial Establishments and Arabian Electronic Projects Establishments, P.O. Box 4657, Jeddah, Saudia Arabia.

THE PROPOSED MERGER

General

This section of the Proxy Statement describes the more important aspects of the proposed Merger but is not complete and is qualified by reference to the Plan of Merger set forth as *Appendix I*. All shareholders are urged to read the Plan of Merger.

Before it becomes effective, the Plan of Merger must be approved by the vote of more than two-thirds of the outstanding Bank common stock entitled to vote. Because Virginia Bankshares owns more than the requisite minimum and has indicated its intention of voting for the Plan of Merger, the Bank's Board of Directors expects the Plan of Merger to be approved. In addition to shareholder approval, the Federal Deposit Insurance Corporation ("FDIC") and the State Corporation Commission of Virginia (the "Corporation Commission") must approve the Merger.

Before acting on the application for approval of the Merger, the FDIC is required to request reports of the competitive factors involved from the Department of Justice, the Comptroller of the Currency and the Board of Governors of the Federal Reserve System. After approval of the Merger, the Department of Justice is notified and the transaction cannot be consummated for a period of 30 days after approval to afford the Department of Justice an opportunity to take such action under the antitrust laws as it deems necessary or desirable in the public interest, including seeking to enjoin the consummation of the transaction. Because Virginia Bankshares already is in a position to control the Bank, the Bank's Board of Directors does not believe that the proposed Merger will stimulate any challenge on antitrust grounds.

It is anticipated that the effective date of the Merger will be on or about May 29, 1987.

Background of the Merger

The proposed Merger represents a continuation of the efforts of FABI to consolidate its banking operations in wholly-owned subsidiaries. In 1983, the merger of four banks, a majority of stock ownership of all of which was owned by the Bank, and a fifth bank not then owned, into the Bank was effected. However, because the Bank at that time was not a wholly-owned subsidiary of Virginia Bankshares, the transaction resulted in the Bank's continuing to have a minority interest of approximately 15% of its outstanding shares held by approximately 2,039 shareholders of record.

In January 1987, FABI proposed a merger to the Bank's Board of Directors. The principal purpose of the Merger is to achieve organizational efficiencies resulting from the Bank's becoming a wholly-owned subsidiary of Virginia Bankshares. Further, the Merger will eliminate the potential for conflicts of interest between minority shareholders of the Bank and Virginia Bankshares and its affiliates. After careful study by the Executive Committee of the Bank's Board of Directors, the Merger was approved by the Board on February 12, 1987 and recommended to the shareholders.

Recommendation of the Board; Reasons for the Merger

At the February 12, 1987 meeting of the Bank's Board of Directors, all directors present unanimously recommended that shareholders vote in favor of approval of the Plan of Merger. The Board's recommendation and conclusion that the Merger is in the best interest of the Bank's shareholders are based upon its evaluation of a number of factors, including those set forth below.

The Plan of Merger has been approved by the Board of Directors because it provides an opportunity for the Bank's public shareholders to achieve a high value for their shares. The price to be paid is about 30% higher

than the $32.50 per share at which the Bank's common stock traded on February 8, 1987, the last trading day prior to announcement of the proposal. In evaluating the fairness of the Merger to the public holders of the Bank's common stock, the Board was aware that the net book value per share on December 31, 1986 was $33.30 and that the $42 per share that will be paid to public holders of the common stock represents a premium of approximately 26% over the book value of the common stock at such date. The Board of Directors was also aware the Bank earned $24,767,000 in the year ended December 31, 1986, compared to $21,190,000 for the 1985 fiscal year.

Opinion of Financial Adviser

The Executive Committee of the Bank's Board of Directors, which had been charged by the full Board of Directors with considering FABI's proposal, also considered a presentation by Keefe, Bruyette & Woods, Inc., an investment banking firm retained by FABI to deliver its written opinion as to the value to be ascribed to the estimated 15% of the shares of the Bank not owned by Virginia Bankshares. Keefe, Bruyette & Woods, Inc., *did not participate in the negotiations in which the price per share to be paid was agreed upon.* The opinion of Keefe, Bruyette & Woods, Inc., which is reproduced in *Appendix III*, relies upon and assumes the accuracy and completeness of the publicly available information concerning the Bank and all additional information concerning the Bank provided by FABI to Keefe, Bruyette & Woods, Inc. Keefe, Bruyette & Woods, Inc. did not attempt to verify independently any such information.

Keefe, Bruyette & Woods, Inc., as part of its investment banking business, is continually engaged in the valulation of commercial bank securities in connection with mergers and acquisitions, negotiated underwritings, secondary distributions of listed and unlisted securities, private placements and valuations for various other purposes. As specialists in the securities of commercial

banks and bank holding companies, Keefe, Bruyette & Woods, Inc. has experience in, and knowledge of, the Virginia banking market and of the major banking companies operating in that market.

For rendering its opinion to FABI, Keefe, Bruyette & Woods, Inc. will be paid $25,000, and if the Merger is consummated, will be paid an additional fee of $75,000. In addition, FABI will reimburse Keefe, Bruyette & Woods, Inc. for all of its reasonable out-of-pocket disbursements and expenses and has extended to Keefe, Bruyette & Woods, Inc. indemnification arrangements usual in such engagements.

Effects of the Merger

If the Merger is consummated, holders of the Bank's common stock other than Virginia Bankshares will no longer have an equity interest in the Bank and will not share in its future earnings and growth to the extent there are earnings and growth. Instead, such holders will have the right to receive $42 cash for each share of the Bank's common stock held by them.

As a result of the Merger, the Bank would become a wholly-owned subsidiary of Virginia Bankshares. The Bank's common stock would no longer be traded in the over-the-counter market and the registration of the Bank's common stock under the Securities Exchange Act of 1934 (the "1934 Act") would terminate. As a consequence, the Bank no longer would file reports with the FDIC and would be relieved of the obligation to comply with the FDIC's proxy rules. Its officers, directors and 10% shareholders would be relieved of the reporting requirements and restrictions on insider trading imposed by Section 16 of the 1934 Act.

After the Effective Date of the Merger, the Bank's Board of Directors will consist of the members of the Board of Directors of the Bank immediately preceding

the Effective Date of the Merger and, similarly, the principal executive officers of the Bank will be the principal officers of the Bank immediately preceding such Effective Date.

Following the Effective Date of the Merger, the Bank will have an initial Board of Directors consisting of the 21 directors elected at the Annual Meeting. They will serve until the next annual meeting, which management expects to be held in April 1988, or until their successors are elected and qualify. No director has any interest in the Merger other than as a holder of the Bank's common stock and each director's holdings of such stock will be converted into the right to receive $42 cash per share in the same manner as all other public shareholders' shares will be converted. If the Merger is made effective, Virginia Bankshares expects to sell shares of its preferred stock to directors to permit compliance with the Virginia Banking Act, which requires a director of a Virginia bank to hold shares in the bank or its parent bank holding company with a par value of $1,000. Under provisions of the agreements that the Bank expects to enter into with the directors, each director will be obliged to resell the preferred shares for the original purchase price to Virginia Bankshares when each ceases to be a director.

Federal Income Tax Consequences

The conversion of shares of the Bank's common stock into the right to receive cash in the Merger will be treated as a taxable sale of stock for federal income tax purposes. Each shareholder whose stock is so converted will recognize any gain or loss realized. The amount of gain or loss realized by a shareholder will be the difference, if any, between the amount of cash to be received ($42 per share) and the cost or other tax basis of the shareholder's shares of the Bank's common stock. If the stock is held as a capital asset, the gain or loss generally

will be long-term if the shares have been held for more than six months and short-term if not held for more than six months on the Effective Date.

The foregoing discussion summarizes for general information the material federal income tax consequences of the Merger to shareholders other than Virginia Bankshares. The tax consequences to any particular shareholder may depend on the shareholder's circumstances. The Bank's shareholders are urged to consult their own tax advisers with regard to federal, state, and local tax consequences.

Consequences If The Merger Is Not Consummated

No significant changes in the Bank's business are contemplated if the Merger is not consummated.

Source of Financing

Financing the proposed Merger will require approximately $31,750,000 in cash to pay the public holders of all outstanding shares of the Bank's common stock for their shares.

The Bank anticipates that the required funds will be provided by FABI to Virginia Bankshares as a contribution to Virginia Bankshares capital. Such funds will be obtained by FABI from its working capital, which was increased in December 1986 by a $45,000,000 contribution to capital by First American Corporation, FABI's sole shareholder. It is not anticipated that any of the funds required to purchase shares will be borrowed.

THE PLAN OF MERGER

The Plan of Merger is set forth in full as *Appendix I*. Information contained in the narrative portion of this Proxy Statement with respect to the proposed transaction is a summary only, and reference is made to *Appendix I* for a complete account of the proposed Merger.

In brief, the Plan of Merger provides for the Merger of FAB Acquisition Bank, which is an "interim bank" organized by Virginia Bankshares solely to carry out the proposed Merger, into the Bank. At the Effective Date of the Merger, each outstanding share of the Bank's common stock, other than shares owned by Virginia Bankshares, will be converted into the right to receive $42 in cash, without interest, from Virginia Bankshares.

Approvals; Effective Date; and Resulting Bank

If the Plan is approved by the affirmative vote of the holders of more than two-thirds of the Bank's common stock entitled to vote, which the board expects to occur because Virginia Bankshares owns more than this number of shares and has indicated its intention to vote for the Plan of Merger, the Merger will become effective upon the filing of Articles of Merger with the Corporation Commission in accordance with Virginia law. The date and time of such filing is referred to herein as the "Effective Date of the Merger." On the Effective Date of the Merger, First American Bank of Virginia, as the Resulting Bank, will continue to own all of the business, property, assets, liabilities and obligations of the Bank.

The Merger requires the approval of the Corporation Commission and the FDIC. FAB Acquisition Bank must receive a certificate of authority to begin business as a bank from the Corporation Commission. Receipt of all such approvals is a prerequisite to the effectiveness of the Merger.

Exchange of Bank Common Stock for Cash

After the Effective Date of the Merger, each holder of outstanding certificates representing the Bank's common stock, other than Virginia Bankshares, upon surrender of the certificates to the Bank, will be entitled to receive therefor the amount of cash into which his shares have been converted by virtue of the Merger. Until such surrender, each outstanding certificate representing the Bank's common stock will be deemed no longer outstanding and will represent only the right to receive $42 per share of common stock held. Cash to be issued to former holders of the Bank's common stock shall be deemed in full satisfaction of all rights appertaining to the Bank's common stock, and after the Effective Date of the Merger, no further dividends will be paid on the Bank's common stock.

Conditions to Merger

The Merger will not occur unless each of the conditions to its effectiveness has been met or waived by the party for whose benefit such condition shall have been given. The principal conditions in the Plan of Merger are that the Plan of Merger shall have been approved by holders of more than two-thirds of the shares of the Bank's common stock entitled to vote, and the approval of the Merger by regulatory authorities having jurisdiction.

Termination of the Plan of Merger

The Plan of Merger will terminate unless all conditions are satisfied and the Effective Date occurs on or before September 30, 1987, and prior thereto upon the disapproval of any regulatory agency having jurisdiction.

Operation of the Business of the Bank

The business conducted by the Bank prior to consummation of the Merger will be continued thereafter by the Resulting Bank.

Board of Directors and Management of the Resulting Bank

The Board of Directors of the Bank as comprised prior to the Effective Date of the Merger will continue to serve as the Board of Directors of the Resulting Bank

and, similarly, the executive officers of the Bank prior to the Effective Date of the Merger will continue to serve as such executive officers after the Effective Date of the Merger.

BUSINESS OF THE BANK

General

The Bank was formed in 1978 by the merger of Clarendon Bank & Trust Company, Alexandria National Bank of Northern Virginia, and Arlington Trust Company, Incorporated under the charter of Arlington Trust and with the title of First American Bank of Virginia.

In 1983, four banks that were majority-owned subsidiaries of Virginia Bankshares (The First National Bank of Lexington, The Peoples National Bank of Leesburg, Shenandoah Valley National Bank and Valley Bank), and First Peninsula Bank and Trust Company were merged into the Bank in exchange for a combination of cash (in the case of First Peninsula) and stock of the Bank (in the case of the four other banks).

In 1984, Round Hill National Bank, which was a majority owned subsidiary of Virginia Bankshares, was merged into the Bank in exchange for stock of the Bank.

As a result of the expansion of its business since 1983, the Bank now serves 18 communities in Northern Virginia, Hampton Roads, Loudoun County and the Shenandoah Valley. Headquartered in McLean, the Bank, which has 1,726 employees, provides financial services to individuals, businesses and governmental units through 101 branch offices. On December 31, 1986 the Bank had total assets of $2,849 million, deposits of $2,465 million, loans net of unearned income of $1,835 million and equity capital of $163 million.

The Bank's services include checking, savings and time deposit accounts offered to individual, business, public and institutional customers; industrial, commercial, consumer, real estate and agricultural loans; international

banking services; processing of collections; and trust services. The trust department had approximately $1,014 million of assets under management as of December 31, 1986. The Bank also provides access for its customers to "MONEY EXCHANGE" (R) automated teller machines located in Virginia, Maryland, and the District of Columbia.

The following ratios are furnished for each of the three fiscal years indicated.

	1986	1985	1984
Net income to average equity capital accounts	16.45%	16.39%	15.01%
Net income to average daily total deposits	1.13%	1.13%	1.07%
Average daily loans to average daily deposits	76.25%	74.60%	65.96%

The markets served by the Bank are highly competitive. Approximately 143 other banks with over 1,653 branches operate in these markets. Several of these competing banks have statewide operations in Virginia. In addition, savings and loan institutions or branches of such institutions, credit unions, finance companies and other competitors or potential competitors operate in the Bank's service areas. The Bank estimates that it has nearly 13.4% of total commercial bank deposits in the Northern Virginia market, 3.2% in Hampton roads, 19.8% in Loudoun County, and 11.6% in the Shenandoah Valley.

The Bank does not believe that a material part of its business is dependent upon a single customer or a few customers, the loss of any one or more of whom would have a materially adverse effect on its business.

The Bank is not a party to any material legal proceedings, other than those arising out of the ordinary course of its business.

Properties

The main offices of the Bank are located in a modern office building owned by the Bank and located at 1970 Chain Bridge Road, McLean, Virginia. The Bank owns 36 and leases 65 banking offices.

The Bank considers all of the properties owned or leased by it to be suitable and adequate for their intended purposes.

Pro Forma Capitalization

The following table sets forth the capitalization of the Bank as of December 31, 1986 and the pro forma capitalization of the Bank assuming the Merger was effective December 31, 1986. The Merger will be accounted for as a purchase on the books of Virginia Bankshares. The following table shows no adjustments in the shareholders' equity because the purchase is between shareholders—namely, Virginia Bankshares and the remaining 15% of the Bank's shareholders.

December 31, 1986
(Unaudited in thousands)

	Existing	Adjustments	Pro Forma
Long Term Debt:			
6% Capital Notes due 1993	$ 1,500	-0-	$ 1,500
6% Capital Notes due 1987	63	-0-	63
Total Long Term Debt	$ 1,563	-0-	$ 1,563
Shareholders' Equity:			
Common Stock, authorized 10,000,000 shares, outstanding 4,896,287 shares	48,963	-0-	48,963
Surplus	22,132	-0-	22,132
Retained Earnings	91,955	-0-	91,955
Total Shareholders' Equity	163,050	-0-	163,050
Total Long Term Debt and Shareholders' Equity	$164,613		$164,613

Per Share Data

The following tabulation presents historical per share data for the Bank. Pro forma combined per share data for the Resulting Bank are omitted as the Merger does not affect the information. Such data are based on historical financial statements for the Bank appearing elsewhere in this Proxy Statement. The data have been adjusted for stock splits and stock dividends.

	Years Ended December 31,				
	1986	1985	1984	1983	1982
Historical Earnings Per Common Share:					
Net Income	$ 5.10	$ 4.48	$ 3.67	$ 3.64	$ 2.95
Cash Dividends Declared Per Common Share:	$ 1.20	$ 1.20	$ 1.20	$ 1.13	$ .95
Book Value Per Common Shares (Period End):	$33.30	$29.42	$26.14	$24.41	$21.95

Recent Market Prices; Dividend History

The Bank's common stock is traded in the over-the-counter market. The following table sets forth for the periods indicated the prices per share and the amount of cash dividends per share by quarters for 1985, 1986, and 1987.

			Dividends Per Share
	1987		
Two Months Ending	Sales *		
	High	Low	
February 28	$39	$32	$.30 per quarter
	1986		
Quarter Ended	Sales *		
	High	Low	
March 31	$31	$31	$.30 per quarter
June 30	32	32	
September 30	32	32	
December 31	32	32	
	1985		
Quarter Ended	Bid/Sales *	Asked	
	High Low	High Low	
March 31	$30 $30	$33 $33	$.30 per quarter
June 30	30 30	N/A N/A	
September 30	30 30	N/A N/A	
December 31	31 31	N/A N/A	

* NASDAQ revised its method of reporting stock prices on April 1, 1985 to report only high and low sales prices.

Description of Bank Common Stock

The Bank has authorized capital stock consisting of 10 million shares of common stock. Each share of common stock is entitled to one vote in person or by proxy on all matters referred to shareholders and the right to receive pro rata such dividends as may be declared by the Board of Directors from time to time out of funds legally available therefor.

Holders of common stock have no liability except for unpaid subscriptions to common stock. In the event of the liquidation of the Bank, holders of Bank's common stock would share pro rata in all assets remaining after provision for liabilities as provided by the Virginia Stock Corporation Act. The Bank's common stock has no conversion rights, no provision for redemption, no sinking

fund rights, no preemptive rights and no cumulative voting rights.

Financial Statements

The Balance Sheets at December 31, 1986 and 1985 and the related Statements of Income, Statements of Changes in Shareholders Investment and Statements of Changes in Financial Position of the Bank for each of the three years in the period ended December 31, 1986, the Notes to Financial Statements, and the Report dated January 29, 1987 of Arthur Andersen & Co., independent public accountants, on the examination of such financial statements, the Financial Review, the Analysis of Interest Income and Selected Inflation Data, all included in the 1986 Annual Report to Shareholders enclosed with this Proxy Statement, are incorporated by reference herein. *See Appendix II.*

Current Information

The Bank is subject to the information requirements of the 1934 Act, and in accordance therewith files reports, proxy statements and other documents and information with the FDIC. The Bank's officers, directors and principal shareholders are also presently subject to certain filing requirements, as well as certain trading restrictions, imposed by the 1934 Act. Such reports, proxy statements and other documents and information are available for inspection and copying at the FDIC, 550 17th Street, N.W., Washington, D.C. 20429.

Proposals for 1988 Annual Meeting of Stockholders of The Bank

In the event the Merger is not consummated, shareholder proposals for the 1988 Annual Meeting of Shareholders of the Bank must be received by the Secretary of the Bank at 1970 Chain Bridge Road, McLean, Virginia 22102, no later than December 23, 1987, for inclusion in

the Proxy Statement for the 1988 Annual Meeting of Shareholders.

Cost of Solicitation of Proxies

The cost of the solicitation of proxies by the management will be borne by the Bank. In addition to the use of the mails, proxies may be solicited personally or by telephone by officers and regular employees of the Bank. The Bank does not expect to pay any compensation for the solicitation of proxies.

Relationship of The Bank with Independent Public Accountants

The Bank selected an independent public accountant, Arthur Andersen & Co., to audit the Bank's books for the year 1986, and it is expected that Arthur Andersen & Co. will serve in that capacity for the year 1987. It is not expected that a representative of the accounting firm will be present at the annual meeting of First American.

In 1986 Arthur Andersen & Co. performed a variety of professional services for The Bank including an audit and tax consultation.

There was no formal approval by the Board of Directors' Audit Committee nor consideration given as to the possible effect on the independence of the accountant prior to the professional services being rendered by Arthur Andersen & Co.

Annual Report of The Bank

ANY SHAREHOLDER OF THE BANK FROM WHOM PROXIES FOR THIS MEETING ARE SOLICITED MAY OBTAIN FROM THE BANK, WITHOUT CHARGE, A COPY OF ITS ANNUAL REPORT TO THE FEDERAL DEPOSIT INSURANCE CORPORATION ON FORM F-2 FOR THE FISCAL YEAR ENDED DECEMBER 31, 1986, INCLUDING THE FINANCIAL STATEMENTS THEREIN AND THE RELATED SCHEDULES, BY WRITTEN REQUEST ADDRESSED TO ERIC W. ERDOSSY, PRESIDENT AND CHIEF ADMINISTRATIVE OFFICER, FIRST AMERICAN BANK OF VIRGINIA, 1970 CHAIN BRIDGE ROAD, McLEAN, VIRGINIA 22102. ANY SUCH REQUEST FROM A BENEFICIAL OWNER OF STOCK NOT REGISTERED IN HIS NAME MUST CONFIRM THAT HE WAS A BENEFICIAL OWNER OF SUCH STOCK ON MARCH 6, 1987.

BY ORDER OF THE BOARD OF DIRECTORS
FIRST AMERICAN BANK OF VIRGINIA

/s/ Milton L. Drewer, Jr.
MILTON L. DREWER, JR.
Chairman of the Board and
Chief Executive Officer

Appendix Index

Appendix I —Agreement and Plan of Merger dated February 12, 1987.

Appendix II —The Bank's financial statements for the years ended December 31, 1986 and 1985 (audited); these statements are included in the Bank's Annual Report, a copy of which is furnished herewith.

Appendix III—Opinion Letter of Keefe, Bruyette, & Woods, Inc.

1/10/87

AGREEMENT AND PLAN OF MERGER OF FAB ACQUISITION BANK INTO FIRST AMERICAN BANK OF VIRGINIA

Agreement and Plan of Merger dated as of February 12, 1987, by and among Virginia Bankshares, Inc., a Virginia bank holding company ("Virginia Bankshares"), FAB Acquisition Bank, a Virginia banking corporation ("FAB"), and First American Bank of Virginia, a Virginia banking corporation ("First American"), FAB and First American being herein sometimes together called the "Constituent Corporations."

WHEREAS, FAB is a corporation duly organized and existing under the laws of the Commonwealth of Virginia, having 100,000 shares of authorized Common Stock ("FAB Common Stock"), of which on the date of this Agreement and Plan of Merger, 100,000 shares were issued and outstanding and were owned by Virginia Bankshares; and

WHEREAS, First American is a corporation duly organized and existing under the laws of the State of Virginia, having 10,000,000 shares of authorized Common Stock ("First American Common Stock") of which on the date of this Agreement and Plan of Merger, 4,896,287 shares were issued and outstanding; and

WHEREAS, the boards of directors of the Constituent Corporations deem it advisable that such corporations merge;

NOW, THEREFORE, in consideration of the premises and of the mutual agreements and covenants herein contained, it is planned, subject to satisfaction of the terms and conditions hereof, that FAB shall be merged into First American, that First American, a Virginia corporation, shall be the resulting bank (the "Resulting Bank"), and that the terms and conditions of such mer-

ger (the "Merger"), the plan and mode of carrying the same into effect, and the manner and basis of converting the shares of the Constituent Corporations, shall be as hereinafter set forth:

1. *Terms, Conditions and Effective Date of Merger.*

1.1 Following adoption of this Agreement and Plan of Merger by the boards of directors of the respective Constituent Corporations and its approval by shareholders of the respective Constituent Corporations as provided by law, the parties hereto shall, except as hereinafter provided, cause Articles of Merger, duly prepared and executed in accordance with the Virginia Stock Corporation Act, to be filed with the State Corporation Commission of Virginia. The separate existence of FAB shall cease as of the close of business on the Effective Date (as hereinafter defined) and FAB shall thereupon be merged into First American.

1.2 The Effective Date shall be the date when, after Articles of Merger shall have been accepted for recording, the State Corporation Commission of Virginia shall issue a Certificate of Merger.

2. *Conversion and Cancellation of Shares*

2.1 The manner and basis of converting, cancelling, or exchanging shares of capital stock of the Constituent Corporations on the Effective Date shall be as follows:

(a) Each share of FAB Common Stock issued and outstanding on the Effective Date shall be cancelled and no new shares or other securities, obligations or cash will be issuable with respect thereto.

(b) Each share of First American Common Stock issued and outstanding on the Effective Date, other than shares of First American Common Stock owned by Virginia Bankshares, shall be converted into the right to receive $42 in cash from Virginia Bankshares.

(c) Each share of First American Common Stock owned by Virginia Bankshares shall be converted into one share of common stock of the Resulting Bank.

(d) As soon as practicable after the Effective Date, First American as Exchange Agent will send a notice and transmittal form to each holder, other than Virginia Bankshares, of a certificate that represented shares of First American Common Stock immediately prior to the Merger, advising such holder of the terms of the exchange effected by the Merger and the procedure for surrendering to the Exchange Agent such certificate for exchange into cash.

(e) Each holder of shares of First American Common Stock other than Virginia Bankshares who shall have delivered his certificate representing such shares to First American as Exchange Agent shall receive a check in the appropriate amount (without interest) from the Exchange Agent.

3. *Articles of Incorporation, By-laws and Directors of the Resulting Bank.*

3.1 On the Effective Date, there shall be no change in the Articles of Incorporation (except any change caused by the filing of Articles of Merger relating to the Merger), By-laws or Board of Directors of the Resulting Bank.

4. *Conditions to the Merger*

4.1 Consummation of the Merger is subject to satisfaction of the following conditions:

(a) The approving vote of the holders of more than two-thirds of the outstanding shares of First American Common Stock at a meeting called and held as provided by Virginia law.

(b) The approving vote of the holder of the outstanding shares of FAB Common Stock in accordance with Virginia law.

(c) The approval of the Merger by the State Corporation Commission of Virginia and the Federal Deposit Insurance Corporation.

5. *Effect of the Merger*

5.1 The Merger, upon the Effective Date, shall have the effect provided for by Section 13.1-721 of the Code of Virginia.

6. *Termination*

6.1 This Agreement and Plan of Merger shall automatically terminate if the Merger has not become effective by September 30, 1987.

WITNESS the following signatures as of the date first above written.

VIRGINIA BANKSHARES, INC.

By /s/ Jack W. Beddow
President

FAB ACQUISITION BANK

By /s/ Milton L. Drewer, Jr.
President

FIRST AMERICAN BANK OF VIRGINIA

By /s/ Milton L. Drewer, Jr.
Chairman of the Board

/s/ Milton V. Peterson

/s/ Sidney O. Dewberry

/s/ Donald R. Maxfield

/s/ Thomas B. Chamberlin

/s/ Henry A. Thomas

/s/ Thomas G. Mays

/s/ Charles T. Lindsay, Jr.

/s/ Glenn W. Saunders, Jr.

/s/ Linda H. Michael

/s/ Charles H. Smith, Jr.

/s/ Verlin W. Smith

/s/ Emanual A. Baker, Jr.

/s/ Eric W. Erdossy

/s/ Joel T. Broyhill

/s/ Harriet F. Bradley

/s/ George W. Johnson

/s/ Jack W. Beddow

/s/ Milton L. Drewer, Jr.

KEEFE, BRUYETTE & WOODS, INC.

Specialists in Banking

Two World Trade Center—New York, N.Y. 10048

January 12, 1987

Mr. Robert G. Stevens
President and Chief Executive Officer
First American Bankshares, Inc.
15th and H Streets, N.W.
Washington, D.C. 20005

Dear Mr. Stevens:

You have requested our opinion as to the value to be ascribed to the approximately 15% of the shares of First American Bank of Virginia (the "Bank") not currently owned by First American Bankshares, Inc. (the "Company"). It is our understanding that the Company wishes to consider making a cash offer to purchase these remaining shares of the Bank.

Keefe, Bruyette & Woods, Inc., as part of its investment banking business, is continually engaged in the valuation of commercial bank securities in connection with mergers and acquisitions, negotiated underwritings, secondary distributions of listed and unlisted securities, private placements and valuations for various other purposes. As specialists in the securities of commercial banks and bank holding companies, we have experience in, and knowledge of, the Virginia banking market and of the major banking companies operating in that market. In carrying out our assignment we have reviewed material bearing upon the financial and operating condition of the Bank, including, among other things: (i) the Subscription Offering dated February 13, 1986; (ii) certain publicly available information for the Bank, including annual reports for 1984 and 1985; (iii) other financial information concerning the business and operations of the Bank, for purposes of

our analysis; (iv) other internal information relating to the Bank furnished to us by the Company for purposes of our analysis; (v) certain information concerning the trading of, and the trading market for, the common stock of the Bank; and (vi) certain publicly available information with respect to certain other banks and bank holding companies and the nature and terms of certain other transactions that we consider relevant to our inquiry.

In conducting our review and arriving at our opinion, we have relied upon and assumed the accuracy and completeness of the publicly available information concerning the Bank and all additional information concerning the Bank provided to us and we have not attempted independently to verify such information.

We have considered such financial and other factors as we deemed appropriate under the circumstances, including, among others, the following: (i) the historical and current financial position and results of operations of the Bank, including interest income, interest expense, net interest income, the net interest margin, non-interest income, non-interest expense, earnings, loan loss reserve levels, the provision for loan losses, net charge-offs, dividends, internal capital generation, book value, intangible assets, return on assets, return on stockholders' equity and capitalization; (ii) the assets and liabilities of the Bank, including the loan, investment, and mortgage portfolios, deposits and other liabilities; and (iii) the historical and current market data for the Bank. We have also taken into account our assessment of general economic, market and financial conditions and our experience in other transactions, as well as our experience in securities valuation and our knowledge of the banking industry generally. Our opinion necessarily is based upon conditions as they exist on, and can be evaluated as of, the date of this letter.

Based upon and subject to the foregoing, we are of the opinion that $42 per share represents a fair price for the

shares of First American Bank of Virginia not currently owned by the Company.

Very truly yours,

KEEFE, BRUYETTE & WOODS, INC.

By /s/ Michael C. Connor
MICHAEL C. CONNOR
Senior Vice President

APPENDIX F

Securities Exchange Act of 1934, Section 14(a), 15 U.S.C. § 78n(a)—It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title.

12 C.F.R. § 335.206(a)—No solicitation or communication subject to this Subpart B shall be made by means of any statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement that, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or that omits to state any material fact necessary in order to make the statement therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter that has become false or misleading . . . .